United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Havel Kelley
11-26-68
F-Meg-T
10 am
(3)

BRIEF FOR APPELLANTS AND JOINT APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

389

No. 21,786

DAVID CARLINER, MARY ELLEN CARTER GROGAN, WILHELMINA VINCEL HETZEL, ARTHUR W. JACKSON, ROBERT GRAYSON McGUIRE, Jr., and WILLIAM WARFIELD ROSS,

Appellants,

v.

COMMISSIONER OF THE DISTRICT OF COLUMBIA, *et al.*,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED MAY 20 1968

Nathan J. Paulson
CLERK

Of Counsel:

RALPH TEMPLE
National Capital Area Civil Liberties Union
1424 - 16th Street, N.W.
Washington, D.C.

DAVID CARLINER
902 Warner Building
Washington, D.C.

HARRY HUGE
1229 - 19th Street, N.W.
Washington, D.C.

ARTHUR W. JACKSON
715 G Street, N.W.
Washington, D.C.

REUBEN ROBERTSON
Union Trust Building
Washington, D.C.

Attorneys for Appellants

Washington, D.C. · THIEL PRESS · 202 · 393-0625

STATEMENT OF QUESTIONS PRESENTED

1. Whether a complaint which alleges that the citizens of the District of Columbia have been deprived of municipal suffrage in violation of the Fifth and Tenth Amendments states a cause of action.

2. Whether Sections 201(b) and 301(b) of Reorganization Plan No. 3, which vest the power to appoint the Commissioner and the members of the District of Columbia Council in the President, are in conflict with the Fifth Amendment.

3. Whether the power to choose the officers of their local government is not a "power reserved to the people" of the District of Columbia within the meaning of the Tenth Amendment.

4. Whether the Reorganization Plan may be construed to deny the citizens of the District of Columbia the right of local suffrage.

INDEX

TABLE OF CASES

Constitutional, Legislative and Administrative Provisions:

Legislative History, Treatises and Other Authorities:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,786

DAVID CARLINER, MARY ELLEN CARTER GROGAN, WILHELMINA VINCEL HETZEL, ARTHUR W. JACKSON, ROBERT GRAYSON McGUIRE, Jr., and WILLIAM WARFIELD ROSS,

Appellants,

v.

COMMISSIONER OF THE DISTRICT OF COLUMBIA, *et al.*,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

This is an appeal from an order of the District Court on February 19, 1968, dismissing appellants' complaint and denying appellants' motion for summary judgment. Jurisdiction of the District Court was invoked under 11-521 of the District of Columbia Code. This Court has jurisdiction of this appeal under 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellants, each citizens and qualified voters in the District of Columbia, brought a class action in the Court below, on behalf of themselves and of other similarly situated citizens of the District of Columbia, to obtain a judgment declaring that those sections of Reorganization Plan No. 3 of 1967 which vest specified powers in the defendants are in conflict with the 5th and the 10th Amendments to the Constitution. Appellants sought an injunction to restrain the defendants from exercising the powers vested in them by Reorganization Plan No. 3. The defendants are the Commissioner of the District of Columbia, appointed by the President of the United States pursuant to Section 301(b) of Reorganization Plan No. 3 of 1967, and the District of Columbia Council, and its individual members, appointed by the President of the United States pursuant to Section 201(b) of the Reorganizatin Plan. (J.A. 3).

Appellees below moved to dismiss the complaint, or alternatively, there being no genuine issues of material fact, for summary judgment (J.A. 8). Appellants opposed the motion to dismiss and cross moved for summary judgment (J.A. 9). The Court below denied both motions for summary judgment and instead granted appellees' motion to dismiss. (J.A. 9, 10). This appeal followed. (J.A. 10).

STATUTE AND EXECUTIVE ORDER INVOLVED

The Reorganization Act of 1949 provides in pertinent part at 5 U.S.C. 904:

> "A reorganization plan transmitted by the President under section 903 of this title—
>
> * * *
>
> (2) may provide for the appointment and pay of the head and one or more officers of an agency (including an agency resulting from a consolidation or other type of reorganization) if the President finds, and in his message transmitting the plan declares,

that by reason of a reorganization made by the plan the provisions are necessary. The head so provided may be an individual or may be a commission or board with more than one member. In case of such an appointment, the term of office may not be fixed at more than 4 years, the pay may not be at a rate in excess of that found by the President to be applicable to comparable officers in the executive branch, and, if the appointment is not to a position in the competitive service, it shall be by the President, by and with the advice and consent of the Senate, except that in the case of an officer of the government of the District of Columbia, it may be by the Board of Commissioners or other body or officer of that government designated in the plan;"

Reorganization Plan No. 3 of 1967 provides at pertinent part:

Section 201(b):

"The Council shall be composed of a Chairman of the Council, a Vice Chairman of the Council, and seven other members, all of whom shall be appointed by the President of the United States, by and with the advice and consent of the Senate. At the time of his appointment each member of the Council shall be a citizen of the United States, shall have been an actual resident of the District of Columbia for three years next preceding his appointment, and shall during that period have claimed residence nowhere else. The Council shall be nonpartisan and no more than six of its members shall be adherents of any one political party. Appointments to the Council shall be made with a view toward achieving a Council membership which will be broadly representative of the District of Columbia community."

Section 301(b):

"The Commissioner shall be appointed by the President of the United States, by and with the advice and consent of the Senate."

STATEMENT OF POINTS

1. The provisions of Reorganization Plan No. 3 of 1967, which vest the power in the Executive to appoint the Mayor-Commissioner of the District of Columbia, and the members of the District of Columbia Council are in conflict with the Tenth Amendment to the Constitution.

2. The power of the citizens of the District of Columbia to elect the Mayor-Commissioner and the members of the District of Columbia Council is a power which has been preserved to them by the Tenth Amendment to the Constitution.

3. The provisions of Reorganization Plan 3 of 1967, which vest the power in the Executive to appoint the Mayor-Commissioner and the members of the District of Columbia Council are in conflict with the Fifth Amendment to the Constitution.

4. The right to vote for the Mayor-Commissioner and the members of the District of Columbia Council is a liberty within the meaning of the Fifth Amendment to the Constitution.

5. The grant to the Congress of legislative jurisdiction over the District of Columbia may not be construed to deny the right of local suffrage to the citizens of the District of Columbia.

6. The complaint states claims upon which relief can be granted by the Judiciary.

SUMMARY OF ARGUMENT

Before Americans had the right to vote for members of a national legislature, for their state governors, or for electors who would select a chief magistrate for their country, they had the right to choose their local governments by their own suffrage. As a leading authority on municipal government has written, ". . . Our country was conceived in the theory of local self-government. . . . From the beginning, political power has been exercised by citizens of the various local communities. . . . Local self-government has come to be regarded as the most important feature in our system". McQuillan, Municipal Corporations, Section 1.91, pp. 324-326 (3rd edition).

As it was for other Americans, this right was assured to the citizens of Alexandria, Georgetown, and Washington, when these three municipalities, as the District of Columbia, became the seat of the federal government.

Granted that the Congress exercises plenary and exclusive power over the District of Columbia, this power no more gives the national legislature the authority to deprive the citizens of the District of their basic rights than a state legislature, in the exercise of its plenary power over municipalities, has to invade the right to vote of those citizens who live in the cities and towns of any state.

The Supreme Court has repeatedly protected the right of citizens to vote in elections for local, as well as for state officials, for city councilmen, as well as for representatives in Congress. That right has been protected by the Supreme Court not only in determining the scope of the rights assured by the 14th Amendment, but in defining the rights of the "people of the several states" as that term appears in Article I, Section 2 of the Constitution.

In the light of the Supreme Court's reaffirmation of the right to vote as the most precious right of a citizen in our democracy, against a backdrop of history which establishes that the citizens of the District of Columbia not only were

intended by the authors of the Constitution to have, but did in fact have for their first 73 years the right to vote for their municipal officers, with a mandate for the adjudication of constitutional questions which requires the courts to deny the legislature and the executive the use of means which "broadly stifle fundamental personal liberties" when the governmental purpose "can be more narrowly achieved"—against all of this can it be reasonably said that the appellants' challenge of the power of the President to appoint the Mayor-Commissioner and the City Councilmen of the District of Columbia does not present a justiciable cause of action?

The historic decisions of the Supreme Court establish not only that the appellants have stated a cause of action, but that they are entitled to a judgment that Sections 201(b) and 301(b) of the Reorganization Plan are in conflict with the Constitution:

First, the "area of freedoms protected" by the Fifth and Ninth Amendments includes, without doubt, the right to vote and that right specifically in municipal elections. Given the power which Congress has to provide a local government for the District of Columbia, neither the Congress nor the Executive may adopt a mode of government in which "the right to vote is undermined."

Second, the power to choose by suffrage the local government of the District of Columbia, history and relevant Supreme Court decisions establish, is a "power reserved to the people" of the District of Columbia under the Tenth Amendment.

Third, given the fact that Sections 201(b) and 301(b) of Reorganization Plan No. 3 of 1967 "trench so heavily on the rights of the citizen" of the District of Columbia in "having a voice in the election of those who make the laws" under which they must live, the Reorganization Act of 1949 should not be construed to vest the power in the President to appoint the Mayor-Commissioner and the City Council of the District of Columbia.

ARGUMENT

I

APPELLANTS' COMPLAINT THAT SECTIONS 201(b) AND 301(b) OF REORGANIZATION PLAN NO. 3 DEPRIVES THEM OF THE RIGHT TO VOTE FOR THE OFFICERS OF THEIR MUNICIPAL GOVERNMENT STATES A JUSTICIABLE CAUSE OF ACTION.

By its order dismissing the complaint below, the Court held in effect that no cause of action is stated by allegations that the citizens of the District of Columbia have been deprived of their right to vote for the officers of their municipal government in violation of the 5th and 10th Amendments to the Constitution.

This holding is clearly in conflict with what is by now a settled and well-defined trend of decisions by the Supreme Court.

Baker v. Carr, 369 U.S. 186 (1961), established that the issue raised in the complaint is justiciable. In *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), the Supreme Court stated the judicial obligation in determining complaints which allege a denial of the right to vote:

> "Almost a century ago, in *Yick Wo v. Hopkins*, 118 U.S. 363, the Court referred to the 'political franchise of voting' as a 'fundamental political right because preservative of all rights', 118 U.S. at 370 . . . Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of the citizens to vote must be carefully and meticulously scrutinized."

The Supreme Court held there as to a complaint, not dissimilar to the allegation here that "qualified voters in the District of Columbia" have been entirely prohibited from voting for members of their city council and for their mayor-commissioner, that:

> "It could hardly gainsaid that a constitutional claim had been asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislatures." *Ibid.*

See also *Wesberry v. Sanders*, 376 U.S. 1, 17, 18 (1964), in which Supreme Court observed:

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right." 376 U.S. 17-18.

The fact that the complaint here deals with the right to vote in municipal elections, as distinguished from elections for members of state legislatures or of the House of Representatives does not make a difference. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), which reversed a dismissal of a claim that Negroes were barred from the right to vote in municipal elections, the Supreme Court expressly held that "legislative control of municipalities, no less than other state power, lies within the scope of relevant limitations imposed by the Constitution", 364 U.S. at 344, 345. See also *Avery v. Midland County, Texas*, 390 U.S. 474 (1967), which applied the doctrine of *Reynolds v. Sims* to elections of officials in cities, towns, and counties.

Neither does it make a difference that the District of Columbia is subject to the exercise of "exclusive legislation" by the federal congress, rather than by a state legislature. The Supreme Court has frequently observed that the power of Congress to legislate for the District is analogous to the power of a state legislature over its municipalities and counties. See *Mattingly v. District of Columbia*, 97 U.S. 687, 690 (1878); *Gibbons v. District of Columbia*, 116 U.S. 404, 407, 409 (1885); *Atlantic Cleaners and Dyers v. United States*, 286 U.S. 427, 432, 435 (1931); and *District of Columbia v. Thompson*, 346 U.S. 100, 109 (1953).

It is not open to question, however, that the exercise of even "plenary" power by Congress over the District of Columbia is subject to constitutional limitations. Thus, in *O'Donoghue v. United States*, 289 U.S. 516, 538-539 (1933), the Supreme Court referred to the "unqualified grant of permanent legislative power" over the District to the Congress, while at the same time the Court cautioned that that grant "does not authorize a denial to the inhabitants (of the District of Columbia) of any constitutional guaranty not plainly inapplicable. 289 U.S. at 539. This view is reiterated with the statement that the Congressional power over the District of Columbia is "subject to the guaranties of personal liberty in the Amendments and in the original Constitution. 289 U.S. at 545-546.

Similarly, *Callan v. Wilson*, 127 U.S. 540, 550 (1888), in applying to the District of Columbia the 6th Amendment's guaranty of an "impartial jury of the *State* . . . wherein the crime shall have been committed" (emphasis supplied), observed:

> "There is nothing in the history of the Constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guarantees of life, liberty, and property . . ."

Again in *Capitol Traction v. Hof*, 174 U.S. 1 (1899), in canvassing the applicability of the 7th Amendment's provisions regarding the right of trial by jury, the Supreme Court held that Congress may "exercise within the District of Columbia all legislative powers that the legislature of a state may exercise within the state . . . so long as it does not contravene any provision of the Constitution of the United States". 174 U.S. at 5. See also, *Downes v. Bidwell*, 182 U.S. 244, 259, 262 (1900).

The question at issue, therefore, is whether the right to vote in municipal elections in the District of Columbia is protected by any provision of the Constitution.

II

THE RIGHT TO ELECT THE OFFICERS OF THE DISTRICT OF COLUMBIA'S MUNICIPAL GOVERNMENT IS A LIBERTY PROTECTED BY THE FIFTH AMENDMENT.

The Supreme Court has never expressly held that the right to vote is afforded the protection of the 5th Amendment. Voting in federal elections has been affirmed under Article I, Section 2 of the Constitution, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964), and under Article I, Section 4, *United States v. Classic*, 313 U.S. 299, 314-315 (1941); and *Ex Parte Yarbrough*, 110 U.S. 651, 663-665 (1883). It has been protected by the 24th Amendment, *Harman v. Forssenius*, 380 U.S. 528 (1964). Suffrage in state, as well as all other elections, is explicitly assured by the 15th Amendment, *Guinn v. United States*, 238 U.S. 347 (1915), and implicitly by the due process and equal protection clauses of the 14th Amendment, *Nixon v. Condon*, 286 U.S. 73 (1932); *Smith v. Allright*, 321 U.S. 649 (1944); *Baker v. Carr*, 369 U.S. 186 (1961); *Gray v. Saunders*, 372 U.S. 368 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Harper v. Virginia Bd. of Election*, 383 U.S. 663 (1965); and *Avery v. Midland County, Texas*, 390 U.S. 474 (1967).

Yet it seems scarcely necessary to argue that the right to vote, including the right to vote in municipal elections in the District of Columbia, is a liberty within the meaning of the due process clause of the 5th Amendment. See, *Bolling v. Sharpe*, 347 U.S. 497 (1954). *United Public Workers v. Mitchell*, 330 U.S. 75, 94-96 (1946), assumes that "political rights" are protected within the 5th Amendment. *Yick Wo v. Hopkins*, 118 U.S. 363, 370 (1886), expressly relied upon in *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), regards voting as "preservative of all rights". *Wesberry v. Sanders*, 376 U.S. 1, 17, 18 (1964), states that "no right is more precious". If, as the Supreme Court observed in *Wolf v. Colorado*, 338 U.S. 25, 27 (1948), the Fifth Amendment encompasses "all those rights which the courts must enforce because they are

basic to our free society", then surely none can doubt that the right to suffrage is the most fundamental of all.

Nonetheless, Judge Gasch in *Hobson v. Tobriner*, 255 F. Supp. 295 (D.D.C. 1966), a ruling which has shadowed the holding below (see *Carliner v. Board of Commissioners*, 265 F. Supp. 736, 738-739 (D.D.C. 1967), vacated as moot, see No. 20,873, U.S. Court of Appeals for the District of Columbia Circuit, Sep. 26, 1967 (the court below rendered no opinion)), held that the "caveats" to the power of the Congress to legislate for the District of Columbia, did not embrace the right to suffrage but "appear to be . . . only those rights of citizens which flow from the Constitution to all citizens" (at 299) and gave judicial cognizance only to trial by jury, presentment by grand jury, and undefined "protections of due process of law" (at 297).

A. The Reorganization Plan "Sweeps Unnecessarily Broadly" in Depriving the Citizens of the District of Columbia Their Right of Local Suffrage.

Judge Gasch's holding seems out of harmony with the teachings of the Supreme Court in dealing with the area of "protected freedoms." When a state abridges "fundamental personal rights and liberties," the Supreme Court held in *Schneider v. State*, 308 U.S. 147, 161 (1939):

> ". . . courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

See also *Shelton v. Tucker*, 364 U.S. 479, 488 (1960), in which the Supreme Court ruled that although

> "the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth

> of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."

Similarly, *Griswold v. Connecticut*, 381 U.S. 479, 485 (1964), in dealing with a right of privacy; held that a legislature may not regulate "by means which sweep unnecessarily broadly". See also *United States v. Robel*, 389 U.S. 258 (1967); *Aptheker v. Secretary of State*, 378 U.S. 500, 514 (1964); *NAACP v. Alabama*, 377 U.S. 288, 307 (1963); and *Kent v. Dulles*, 357 U.S. 116, 125-127, 129 (1957).

History has in fact demonstrated that the Congress can, and has, achieved its "legitimate and substantial" purpose to exercise "complete authority at the seat of government" (*The Federalist*, No. 43, Madison) by "less drastic means" than by depriving the citizens of the District of Columbia of their right to municipal franchise. As we show below (*infra* p. 31), while the assumption of jurisdiction from Virginia and Maryland over the District of Columbia resulted in the loss of representation in the Congress, in the state legistures, and until the adoption of the 23rd Amendment, of the right to vote for the President, it did not result in the loss of suffrage in local elections until 1874.

The historic legislative choice which afforded municipal suffrage to the District is plainly consonant with the Constitution. *District of Columbia v. John R. Thompson, Inc.*, 346 U.S. 100, 109 (1953). The denial of local suffrage is not. Although the right to municipal franchise was not an issue in *Thompson*, the Supreme Court sustained there an act of the last elected Legislative Assembly of the District of Columbia, holding not only that Congress had the "authority . . . to delegate its lawmaking authority to the Legislative Assembly of the municipal corporation . . .", but that it "would seem" to have the "power . . . to grant self-government to the District of Columbia". See too *Stoutenburgh v. Hennick*, 129 U.S. 141, 147 (1889), in which the Court, while invalidating a tax imposed by the elected Legislative Assembly, in reviewing the relationship between the legislative

powers of a municipal government and those of the Congress, declared:

> "It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities, and general affairs by the central authority, and hence, while the rule is also fundamental that the power to make laws cannot be delegated, the creation of municipalities exercising local self-government has never been held to trench upon that rule. Such legislation is not regarded as a transfer of general legislative power, but rather as the grant of the authority to prescribe local regulations, according to immemorial practice subject, of course, to the interposition of the superior in cases of necessity . . . as the repository of the legislative power of the United States, Congress in creating the District of Columbia 'a body corporate for municipal purposes' could only authorize it to exercise municipal powers, and this is all that Congress attempted to do."

In this context, a "clash" between the exercise of an enumerated power by Congress and an "individual liberty protected by the Bill of Rights" (see *United States v. Robel*, 389 U.S. 258 (1967), places upon the courts a "'delicate and difficult task' to determine whether the resulting restriction on freedom can be tolerated".

Apart from the doctrine of the cases which have followed in the wake of *Schneider v. State*, 308 U.S. 147 (1939), and its holding that "a governmental purpose to control or prevent . . . activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms", *NAACP v. Alabama*, 377 U.S. 288, 307 (1963), and *United States v. Carolene Products Co.*, 304 U.S. 144, 152-153, fn. 4, suggest that "restrictions upon the right to vote" may be subjected to more exacting judicial scrutiny than are most other types of legislation.

Under such scrutiny, Sections 201(b) and 301(b) of the Reorganization Plan must fail. Pursuant to the Plan, the

District of Columbia Council has been assigned "quasi-legislative functions" (Reorganization Plan No. 3 of 1967, H. Doc. No. 132, 90th Cong., 1st Sess. p. IV) analogous to those exercised by the elected Legislative Assembly approved by the Supreme Court in *District of Columbia v. John R. Thompson, Inc.*, 346 U.S. 100 (1963). Yet the Council for no reason other than the purported requirement of the Reorganization Act of 1949, 5 U.S.C. 904, requires the members of the District of Columbia Council, to be appointed by the President. "Appointments . . . shall be made with a view toward achieving a Council membership which will be broadly representative of the District of Columbia community" must be "non-partisan" and "no more than six of its members shall be adherents of any one political party". Section 201(b), Reorganization Plan No. 3, H. Doc. op. cit. p. 1.

The answer to the appointment method for selecting persons who are "broadly representative of the community" was set forth in the very Presidential Message which accompanied the plan to the Congress: ". . . Only home rule will provide the District with a democratic government—of, by and for its citizens". *Ibid.* p. vi. Unlike *Robel*, *Aptheker*, and the and the other cases in which the Supreme Court invalidated legislation which "broadly stifled individual liberties", the appellees here cannot invoke any asserted need for requiring that persons who are to be "broadly representative of the District of Columbia community" be appointed rather than chosen by a method which would make them truly representative.

Nor does the selection of the Commissioner stand on any different footing. Although he is not required to be "broadly representative of the District of Columbia community," he is required to be a resident of the District of Columbia, and in specified circumstances, for a period of three years (Section 301(b)), and as the highest magistrate of the District of Columbia, he is vested with executive power over the municipal corporation.

The present action therefore stands on much different ground from *United Public Workers v. Mitchell, supra*, 330 U.S. 75 (1946), which sustained restrictions on the political activities of government employees. There Congress in the exercise of its legislative power over the civil service sought "to protect a democratic society against the supposed evil of political partisanship by classified employees of government". 330 U.S. at 96. "To declare that the present supposed evils of political activity are beyond the power of Congress to redress", the Court held, "would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system".

By contrast here, no "supposed evil" has been asserted by any as justification for vesting in the President, rather than in the citizens of the District of Columbia, the power to select the Commissioner and the members of the District of Columbia Council. Indeed, the sponsor of the Reorganization Plan himself implies that his power to appoint the Commissioner and the members of the District of Columbia Council is a less desirable alternative for the "democratic system" than selecting these officers by local suffrage. See Reorganization Plan No. 3 of 1967, Message from the President of the United States, H. Doc. 132, 90th Cong., 1st Sess., p. vi.

The principle which the Supreme Court has invoked for the rights of speech, association, travel, and employment since its decision in *Schneider v. State, supra*, 308 U.S. 147 (1939), is even more compelling here where what is at stake is that "fundamental political right . . . (which is) . . . preservative of all rights", *Yick Wo v. Hopkins*, 118 U.S. 363 (1886); a right "which existed from the very earliest settlement of this country, never for a moment suspended or displaced", *People v. Hurlbut, infra*, 24 Mich. 44, 98, 9 Am. St. R. 103, until 1874 by Congress in the District of Columbia; and a right which was sacrificed to meet no evil.[1]

[1] See Views of the Minority, S. Rep. No. 572, 44th Cong. 2d Sess., Joint Select Committee to Frame a Government For the District of

III

ALTHOUGH NOT EXPRESSLY ENUMERATED AMONG THE RIGHTS IN THE BILL OF RIGHTS, THE RIGHT TO VOTE IN MUNICIPAL ELECTIONS IS A RIGHT RETAINED BY THE PEOPLE WITHIN THE MEANING OF THE NINTH AMENDMENT.

In *Hobson v. Tobriner*, 255 F. Supp. 295, 299 (1966), Judge Gasch in effect held that local suffrage was excluded from the protection of the 5th Amendment because it has not been expressly identified as a right "which flows from the Constitution to all citizens".

This view seems clearly in conflict with the explicit language of the Ninth Amendment: "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people".

As Justice Goldberg observed in his concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 488, 492-493 (1965), "the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments".

Columbia, dealing with the legislation which became the Organic Act of 1878, 20 Stat. 102., pp. 10-11:

> "It is frequently asserted that the experiment of popular local government in the District of Columbia has been a failure, and that a change to some other form is necessary in order to prevent a further infliction of evils upon the community. The fallacy of this statement is that the change has already been made, and that the evils complained of arose out of that change. The late government of the District was not in any true or even comparative sense a popular government. The pretense only of an elective feature was preserved; all actual power lay in the governor and the board of public works. Neither the legislative assembly, so called, nor the people of the District, were in any manner or degree responsible for the acts of that board, since neither had power to control the board in the slightest particular. The attempt to charge to the account of popular suffrage the acts of persons whom the suffrage could not reach is an absurdity."

In *United Public Workers v. Mitchell*, 330 U.S. 75, 94-95, (1946), the Supreme Court in effect has already held that the right to vote is a right within the meaning of the Ninth Amendment and a power reserved to the people within the meaning of the Tenth Amendment. In dealing with the right of a federal government employee to take "active part in political campaigns," a right which is certainly not superior to the right to vote itself, the Court declared:

> "We accept appellant's contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments are involved . . . The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon the rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken . . ." (330 U.S. 75, 93-96 (1946).)

It is no answer to the inquiry suggested by *United Public Workers* to justify the deprivation of municipal suffrage for the citizens of the District of Columbia upon the basis of the "grant of power" to the Congress to "exercise exclusive legislation" over the District of Columbia by Article I, Section 8, Clause 17 of the Constitution.

As originally drafted, the Ninth Amendment offered by James Madison provided (I Annals of Congress, 439, June 8, 1789):

> "The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people, *or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers*, or as inserted merely for greater caution . . ." (emphasis supplied).

The decisions of the Supreme Court with regard to rights of citizens of the District of Columbia make it clear that the power granted to the Congress over the District of Columbia

does not authorize the infringement either of rights "reserved by the Ninth and Tenth Amendments" or of rights enumerated in the eight other Amendments in the Bill of Rights.

Thus the residents of the District may not be deprived of First Amendment rights (*Bradfield v. Roberts*, 175 U.S. 291 (1899)); of trial by jury (*Callan v. Wilson*, 127 U.S. 540 (1888) and *Capitol Traction Co. v. Hof*, 174 U.S. 1 (1899)); or presentment by grand jury (*United States v. Moreland*, 258 U.S. 433 (1922)); or the various protections afforded by due process (*Wright v. Davidson*, 181 U.S. 371 (1901); *O'Donoghue v. United States*, 289 U.S. 516 (1933); and *Bolling v. Sharpe*, 347 U.S. 497 (1954)).

Nor does the fact that the power vested in Congress is "exclusive" add to its authority to trench upon freedoms otherwise protected by the Constitution. In *District of Columbia v. J. R. Thompson, Inc.*, 346 U.S. 100, 109 (1953), the Supreme Court explored the meaning of the "exclusive" clause and stated:

> ". . . It is clear from the history of the provision that the word 'exclusive' was employed to eliminate any possibility that the legislative power of Congress over the District was to be concurrent with that of the ceding states."

The history of suffrage in the District of Columbia, from its beginnings through 1874, as we show below, is ample proof that the power of Congress to legislate for the District of Columbia includes no grant to deprive the citizens of the District of their municipal suffrage.

IV

THE POWER TO CHOOSE THE OFFICERS OF THE MUNICIPAL GOVERNMENT OF THE DISTRICT OF COLUMBIA BY AN ELECTION OF THE PEOPLE IS A POWER RESERVED TO THE PEOPLE WITHIN THE MEANING OF THE TENTH AMENDMENT.

The Tenth Amendment to the Constitution provides that the "powers not delegated to the United States . . . are reserved . . . to the people".

The complaint below and this appeal pose the question whether the right to choose the officers of their local government is not a "power" within the meaning of the Tenth Amendment, which has been reserved to the "people" of the District of Columbia, notwithstanding the grant of legislative power over the District to Congress.

The meaning intended by the Founding Fathers to the great phrases in the Bill of Rights is usually determined, of course, against the backdrop of English constitutional history. See *Boyd v. United States*, 116 U.S. 616 (1886); *Grossjean v. American Press Co.*, 297 U.S. 233, 250 (1936); *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Stafford v. Texas*, 379 U.S. 476 (1964).

See also, Hon. John M. Harlan, Associate Justice, U.S. Supreme Court, "The Bill of Rights and the Constitution,", Address, August 9, 1964, in which Justice Harlan observed: "For the most part the Rights assured by the first ten amendments against federal invasion were simply those enjoyed by Englishmen under the institutions of the mother country, having their origins in the provisions of the Magna Carta, that famed fountainhead of individual liberty".

A. The Right of Local Self-government Was Firmly Established in the Colonies and in the States as a Right of the People Before the Adoption of the Constitution.

History establishes that prime among these rights was that of municipal suffrage. Before the establishment of the American Colonies, Englishmen had achieved the political right of local self-government in the Magna Carta. See Chapter 13, Magna Carta, in A.E. Dick Howard, "Magna Carta, Text and Commentary," p. 38, Magna Carta Commission, Charlottesville, Virginia (1964), which provides: "The City of London shall have all her ancient liberties and customs. Moreover, we will and grant that all other cities, boroughs, towns, and ports shall have all their liberties and free customs". Those liberties included that of choosing the mayor and aldermen who enacted and enforced local legislation. See McKechnie, Magna Carta, pp. 240-248; and Pollock and Maitland, History of English Law, I, 66, pp. 641-656.

Local self-government was transplanted and reinforced within the Colonies prior to the American revolution. See Marion L. Kenney *Approaches to Local Government in the District of Columbia, 1789-1820* (Appendix), in which the author collates the contemporaneous materials. These show the development of local self-government in the colonies, the "emergence from the townships of the doctrine of the sovereignty of the people", and the express understanding and agreement of the authors of the Constitution that the seat of government would possess suffrage for control over its municipal affairs.

As Kenney states, "From whatever state the (Constitutional) Convention delegates came, they had, one and all, lived in communities which accepted as normal the idea of self-governing municipalities incorporated originally under colonial governments, and, since the Declaration of Independence, under state legislatures."

And as Clinton L. Rossiter, in "Seedtime of the Republic: The Origin of the American Tradition of Political Liberty", 1953, p. 16, reviewing the development of political power in the towns, parishes, counties, and boroughs in the American colonies, has observed, "Self-government was doubly the rule in colonial America."

This view is reflected in McQuillan, "Municipal Corporations", Section 1.91, pp. 324-326 (3rd edition), which states:

> "Our country was conceived in the theory of local self-government, and from the beginning, political power has been exercised by citizens of the various local communities as local communities. Having been so dedicated by long practices, local self-government has come to be regarded as the most important feature in our system."

See also the opinion of Judge Cooley, the celebrated constitutional authority, in the leading case of *People v. Hurlbut*, 24 Mich. 44, 9 Am. St. R. 103 (1871):

> "The constitution (of Michigan) has been adopted in view of a system of local self-government, well understood and tolerably uniform in character, existing from the very earliest settlement of this country, never for a moment suspended or displaced, and the continued existence of which is assumed. . ." 24 Mich. at 98."

And at 102: "Our traditions, practices, and expectations have all been in one direction. . . . (They have) . . . included the power to choose in some form the persons who are to administer the local regulations."

This has been the view also of the Department of Justice. In hearings on House Joint Resolution 18 to provide for national representation of the District of Columbia in Congress, Henry H. Glassie, testifying for the Attorney General, declared: ". . . What was the claim of the Americans to full participation in the Government before the Revolution? Participation in local government? Not at all. They had that. It was participation in that sovereign imperial parlia-

ment which made the law." Hearings on House Joint Resolution No. 8, House Committee on the Judiciary, 70th Cong., 1st Sess., p. 72 (1928).

The historical materials establish beyond doubt that whatever the form of local administration in the Colonies before the Revolution or in the Confederation after the Revolution may have been, the doctrine of local self-government had strongly taken hold in this country by the time of the writing of the Constitution.

B. The Framers of the Constitution Did Not Intend To Deprive the Citizens of the District of Columbia of Their Pre-existing Right of Local Suffrage.

Did the authors of the Constitution mean to deprive the citizens of the federal seat of government of their pre-existing right to choose their municipal government?

The specific materials relating to the establishment of the District of Columbia as the seat of government begin with the Continental Congress of 1783. A committee, whose members included James Madison, dealing with the jurisdiction which Congress should have "in the place of their permanent residence", reported a resolution that Congress should have "exclusive jurisdiction", amplified by a motion by Madison that the seat of government "ought to be entirely exempted from the authority of the States ceding the same and the organization and administration of the powers of government within the said District *concerted* between Congress and the inhabitants thereof" (emphasis supplied). A further resolution was presented by Arthur Lee which provided that "the people inhabiting within said territory should enjoy the privilege of trial by jury and of being governed by representatives of their own selection". See Journals of the Continental Congress, 1774-1789, pp. 603-604, Sept. 22, 1783.

The Journals of the Constitutional Convention (2 Farrand, "The Records of the Federal Convention of 1787," 127-128 (rev. ed. 1937)) indicate that the use of the term "exclusive"

in Article I, Section 8(17) of the Constitution, "was employed to eliminate any possibility that the legislative power of Congress over the District was to be concurrent with that of the ceding states". See *District of Columbia v. John R. Thompson, Inc.*, 346 U.S. 100, 109 (1953).

That it was not intended to foreclose local suffrage to the District on the ratification of the Constitution is amply established by James Madison. In discussing the establishment of a federal district as the seat of government in his famous essay in the Federalist papers, No. 43, Madison declared:

> ". . . they (the inhabitants of the district) will have had their voice in the election of the government, which is to exercise authority over them; . . . a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them. . . . *The Federalist*, No. 43.

While not addressed to the question whether the citizens of the "seat of government" would continue to exercise suffrage under the Constitution, Jefferson, as Secretary of State, had occasion to advise President Washington whether to veto the bill to transfer the "seat of government" to the Potomac. In the course of that opinion, the precise question being whether Congress, without the Executive, could transfer the seat of government, Jefferson observed in language no less applicable to the inhabitants of the seat of government than to Congress itself:

> "Every man, and every body of men on earth, possesses the right of self-government. They receive it with their being from the hand of nature. Individuals exercise it by their single will; collections of men by that of their majority; for the law of the *majority* is the natural law of every society of men. When a certain description of men are to transact together a particular business, the times and places of their meeting and separating, depend on their own will; they make a part of the natural right of self-government. This, like all other natural rights, may be abridged or modified in its exercise by their

> own consent, or by the law of those who depute them, if they meet in the right of others; but as far as it is not abridged or modified, they retain it as a natural right, and may exercise them in what form they please, either exclusively by themselves, or in association with others, or by others altogether, as they shall agree. . . ." See "Writings of Thomas Jefferson," Memorial Edition, 1903, Vol. III, 1903, pp. 59, 60-61.

That Jefferson understood his views as to the right of self-government to apply to the District of Columbia appears expressly in his "Opinion Relative to Locating the 10-Mile Square for the Federal Government and Completing the Federal City", March 11, 1791, in which he referred to the formation of a "town legislature" for the District. See Padover, "Thomas Jefferson and the Nation's Capital," pp. 47-48.

In November 1800, when Congress met in Washington for the first time, President Adams addressed it regarding the problem of the government of the District:

> "It is with you, gentlemen to consider whether the local jurisdiction over the District of Columbia shall immediately be exercised. If in your opinion this important trust ought now to be executed, you can not fail to view the future probable situation of the territory, for the happiness of which you are now to provide. You will consider it as the capital of a Great Nation, advancing with unexampled rapidity—in the arts, in commerce, in wealth and in population, and possessing within itself, those energies and resources which, if not thrown away or lamentably misdirected, secure to it a long course of prosperity and *self-government.*" Annals of Congress, 6th Cong. 2nd Sess., p. 723, Nov. 22, 1800. (Emphasis supplied.)

The debates that followed hinged less on the degree of self-government to be granted than on the question of when, if ever, Congress should assume jurisdiction. At the time of cession, Congress had ruled that the inhabitants of the

District should continue to be governed by the laws of their respective states. Under this ruling they had continued to enjoy full privileges of citizenship, including participation in national elections. The fact that assumption of jurisdiction by Congress would, unless the Constitution were amended, deprive the inhabitants of participation in national affairs, led many members of Congress to oppose assumption.

On December 17, 1800, General Lee reported out of a committee of the House, a bill for the local government of the District which continued existing laws in force in both parts of the District from the first Monday of December, 1800, and confirmed executive and judicial officers in their places until removal by the President, with future applicants to be authorized under the "exclusive legislation" clause of the Constitution. It also specified that:

> "Nothing in the act should alter, impeach, or impair the rights granted by or derived from acts of incorporation of Alexandria and George-Town, or any other body corporate or politic within the said District". Annals of Congress, 6 Cong. 2 Sess., p. 824 (December 17, 1800).

The debate which ensued revealed a sharp division between members favoring immediate assumption of jurisdiction, and those favoring deferment as long as possible, and even forever. But neither in this bill, nor in any subsequent bills, was there any thought of encroaching upon the established rights and privileges of the incorporated municipalities. The Congressional debate regarding the form of government for the area comprising the District of Columbia and the franchise to be accorded to its citizens is set forth in detail in *Kenney*, see Appendix, and will therefore not be restated here.

The fact is, of course, that the inhabitants of the District of Columbia retained local suffrage from the very beginning of their establishment as the "seat of government" until 1874. The town of Georgetown, with municipal suffrage accorded to its citizens, was incorporated in 1789 prior to

the adoption of the Bill of Rights. 2 Laws of Maryland, c. 23 (1789) (Kilty 1800). The town and county of Alexandria, which formed a part of the original cession of land for the District of Columbia, each possessed the right of local suffrage at the time of cession. See Virginia Collection of Acts in Force 29, 91, 189, 261 (Davis 1794) and 10 Laws of Virginia 172, c. 25 (Hening 1822).

When these areas were ceded to the Congress as to be the "seat of government," their inhabitants continued to exercise their right of suffrage. 1 Stat. 139; 2 Stat. 103.

The City of Washington, from the time of its first charter, until the enactment of the Temporary Organic Act of 1874, 18 Stat. 116, possessed the right of local suffrage. The Act of 1802 Incorporating the City of Washington provided for an appointed mayor and an elected city council, 2 Stat. 195, ch. 53, I D.C. Code xxvii. Under the Act of 1812 Amending the Charter of Washington, the city government became composed of a board of aldermen and a board of common council, both elected, and a mayor, chosen by the aldermen and councilmen, 2 Stat. 721, ch. 75, I D.C. Code xxix. The Act of 1820 Reorganizing the Government of the City of Washington retained the aldermen and councilmen, but provided for the popular election of the mayor (section 3), 3 Stat. 582, ch. 1043, I D.C. Code xxxiii. Under the Act of 1848 Reorganizing the Government of the City of Washington, the existing officers were retained, and the election of several other officials was provided for (sections 3, 4), 9 Stat. 223, ch. 42, I D.C. Code xxxvii. The Act of 1871 to Provide a Government for the District of Columbia established a bicameral legislative assembly with an elected house of delegates, 16 Stat. 419, ch. 62, I D.C. Code xlv-xlvi.

It is not without significance that the legislation which assured to the citizens of the District the right of municipal suffrage was adopted by a Congress whose members included twelve participants in the Constitutional Convention. See Annals of Congress, 7th Cong. 2nd Sess. p. 610, 1802. The views of that Congress as to the rights of citizenship in the

District of Columbia therefore carry especial weight in determining the scope of the powers included within the Tenth Amendment. Cf. *Myers v. United States*, 272 U.S. 52, 136 (1926) evaluating the significance of the views of the First Congress in determining the power of the Executive.

The views of the Constitutional fathers regarding local suffrage are also illustrated in the treatment which they intended to be afforded to the inhabitants of territories. Compare Article IV, Section 3(2) of the Constitution with Article I, Section 8(17).

At the very moment of the writing of the Constitution, the Northwest Ordinances, adopted in 1784, 1785, and again in 1787, made local self-government the foundation stone of the political structure in the territories.

". . . The settlers on any territory . . . shall . . . receive authority . . . to meet together for the purpose of establishing a temporary goverbment, to adopt the constitution and laws of any of the original states . . . to erect counties and townships for the election of members to the legislature . . ." Report for the Government of the Western Territory, March 22, 1786, Clarence E. Carter, "The Territorial Papers of the United States."

Such also is the understanding of the Supreme Court. In *Clinton v. Englebrecht*, 80 U.S. 434, 441 (1871) in dealing with the rights of the inhabitants in the territories, the Supreme Court declared:

> "The theory upon which the various governments for portions of the territory of the United States have been organized, has ever been that of leaving to the inhabitants of all the powers of self-government consistent with the supremacy and supervision of the national authority and with certain fundamental principles established by Congress."

Cf. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 330-331 (1935). See also *Rasmussen v. United States*, 197 U.S. 516 (1905) and *Balzac v. Puerto Rico*, 258 U.S. 298 (1922).

It suffices to say in summary that nothing in their contemporaneous conduct and nothing in their legislative actions following the adoption of the Constitution indicates that the authors of the Constitution had any intent whatever to deprive the inhabitants of the seat of government of the franchise to control their municipal government.

C. The decisions of the Supreme Court indicate that the power to choose local governments by suffrage is a power reserved to the people.

Although the Supreme Court has never expressly defined what powers are reserved to the people under the Tenth Amendment, its decisions indicate that the power to choose the officers of their local government is one such power.

In *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964), the Supreme Court construed the term "by the people of the several states" which appears in Article I, Section 2 of the Constitution, a term which is analogous to the clause in the Tenth Amendment.

Against the contention that the Constitution reposed power in the *states* to determine the qualifications for the electors of members of the federal House of Representatives (see dissenting opinion, Harlan, J., 376 U.S. 20, 22-26), the majority opinion of the Court held:

> "We do not believe that the Framers of the Constitution intended to permit . . . the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the people', a principle tenaciously fought for and established at the Constitutional Convention".

If our "fundamental ideas of democratic government" and the historical context of the phrase "people of the several states" require the application of the one-man one vote

doctrine to the election of the members of the House of Representatives, the right of local suffrage stands on no less firm ground.

As appellants have indicated earlier (see *supra*, pp. 20-21), local self-government had become deeply rooted in the United States by the time of the writing of the Constitution, so much so that the issue did not even merit debate, much less a "tenacious" fight, at the Constitutional Convention. See *Stoutenburgh v. Hennick*, 129 U.S. 141, 147 (1889): "It is a cardinal principle of our system of government, that local affairs shall be managed by local authorities", referring to "municipalities exercising local self-government".

And see *Avery v. Midland County, Texas*, decided this term by the Supreme Court, 390 U.S. 474 (1967):

> "While state legislatures exercise extensive power over their constituents and over various units of local government, the States universally leave much policy and decision making to their governmental subdivisions. Legislators enact many laws, but do not attempt to reach those countless matters of local concern necessarily left wholly or partly to those who govern at the local level. What is more, in providing for the governments of their cities, counties, towns, and districts, the States characteristically provide for representative government—for decision making at the local level by representatives elected by the people. And, not infrequently, the delegation of power to local units is contained in constitutional provisions for local home rule which are immune from legislative interference. In a word, institutions of local government have always been a major aspect of our system . . . ."

In this context, the observations regarding the District of Columbia which appear in *Downes v. Bidwell*, 182 U.S. 244, 260 (1900) are a forceful suggestion that the right of local self-government is protected by the 10th Amendment:

> "The District had been a part of the states of Maryland and Virginia. It had been subject to the Constitution and was part of the United States. The Constitution had attached to it irrevocably. . . The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution . . . If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants it would have been void; in other words, Congress could not do indirectly, by carving out the District, what it could not do directly . . . ."

When the land which now comprises the District of Columbia was ceded to the Congress, the Maryland Declaration of Rights applied to its people and provided:

> "That the right in the people to participate in the legislature is the best security of liberty, and the foundation of all free government; for this purpose elections ought to be free and frequent, and every man having property in, a common interest with, and an attachment to the community, ought to have a right of suffrage." See I D.C. Code, p. xx.

Manifestly, under the doctrine set forth in *Downes v. Bidwell, supra*, Congress would have been without the power to deprive the citizens of Georgetown, Maryland, of their local suffrage which they achieved prior to the cession. 2 Laws of Maryland, c. 23 (1789) (Kilty, 1800); I D.C. Code, pp. lxi-lxii. Yet after the cession, Congress did what *Downes v. Bidwell* says is forbidden. See Section 40, Act of 1871 Creating Legislative Assembly, 16 Stat. 419, D.C. Code, pp. xlv, xlix; and Temporary Organic Act of 1874, 18 Stat. 116, I D.C. Code, l-lii. The provisions of the Reorganization Plan which perpetuate the deprivation of local suffrage would appear equally to come within the proscription of *Downes v. Bidwell.* See also, for the applicability of the 10th Amendment to political rights, *United Public Workers v. Mitchell,* 330 U.S. 75, 94-95 (1946), in which the Supreme Court

treated "rights retained" under the Ninth Amendment as the equivalent of "powers reserved" under the Tenth Amendment. *Supra*, pp. 17-18.

Significantly, this was the view of the minority report of the Joint Select Committee to Frame a Government for the District of Columbia, which drafted the Organic Act of 1878, 20 Stat. 102, I D.C. Code Lii-Lv, which resulted in the disfranchisement of the citizens of the District from 1878 to 1967:

> "It is assumed that the legislative power of Congress is a power absolute and unlimited . . . that the inhabitants of the District can have no right to participate in the exercise of that power . . . except such as may be delegated to them by Congress . . . .
>
> "It is the opinion of the minority that the power of Congress over the District . . . is legislative power; that is to say, the power to make laws and to provide for their enforcement . . .(but it) . . . does not imply that there are no practical or even legal limitations to its exercise. Absolute power in its unrestricted sense has no existence in America . . . . The powers of Congress are, in all cases, limited by the reserved rights of the people. . . .
>
> "The expressed rights, declared by the Constitution to be possessed by 'the people' are possessed by the people of the District. These are the personal rights and the rights of property. * * * These are any rights commonly possessed and enjoyed by citizens of the United States. They include the right of association for common purposes, the rights exercised in common of protecting property, of promoting the general convenience, of regulating the mutual concerns of an American community. They include the right of self-government.
>
> "The legislative power of Congress in the District is subject to these, and to other, limitations."

S. Rept. No. 572, 44th Cong. 2d Sess., Joint Select Committee to Frame a Government for the District of Columbia, January 11, 1877, pp. 14-15.

V.

THE REORGANIZATION ACT SHOULD NOT BE CONSTRUED TO PERMIT THE DEPRIVATION OF THE RIGHT TO VOTE

A further question as to the constitutionality of Sections 201(b) and 301(b) of Reorganization Plan No. 3 of 1967 is posed by *Kent v. Dulles*, 357 U.S. 116, 125-127, 129 (1957). While Section 7 of the Reorganization Act of 1949, 5 U.S.C. 902, specifically includes the municipal government of the District of Columbia as an agency subject to reorganization under the procedures specified, no language in that statute authorizes the deprivation of the right of suffrage. See 5 U.S.C. 901 *et seq.*

In *Kent*, the Supreme Court was concerned with a statute which similarly vested broad powers in the Executive, specifically that of granting passports under the Passport Act of 1926, 22 U.S.C. 211a. To the argument that Congress gave the Secretary of State "discretion to grant or withhold" a passport, the Supreme Court held:

> "Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. . . . [citing cases] We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen".

Plainly, the authority which the Congress had given the President to reorganize the government of the District of Columbia, although sufficient, without doubt, to substitute a Commissioner-Mayor and a nine-member Council for three commissioners, and to distribute responsibilities between the two organs of municipal government, is not authority "to trench so heavily on the rights" of District citizens as to deny their right to elect these officials. *See also Schneider v. Smith*, 390 U.S. 17 (1967), in which the Supreme Court was "loathe to conclude that Congress", in granting authority to the President to safeguard vessels and waterfront facil-

ities from sabotage, "undertook to reach into the First Amendment area."

The Reorganization Act, like the statutes construed in *Kent v. Dulles* and *Schneider v. Smith*, should not be interpreted so broadly as to give power to the President to deprive the citizens of the District of Columbia of their right to choose by suffrage their Mayor-Commissioner and City Council member.

CONCLUSION

For the reasons submitted above, appellants urge that the order dismissing their complaint below be reversed and that the case be remanded to the District Court with directions to enter summary judgment for the appellants.

Respectfully submitted,

David Carliner
902 Warner Building
Washington, D.C.

Harry Huge
1229 19th Street, N.W.
Washington, D.C.

Arthur W. Jackson
715 G Street, N.W.
Washington, D.C.

Reuben Robertson
Union Trust Building
Washington, D.C.

Attorneys for Plaintiffs

Of Counsel:

Ralph Temple
National Capital Area Civil
Liberties Education and
Defense Fund
1424 - 16th Street, N.W.
Washington, D.C.

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID CARLINER
2941 Chesapeake Street, N.W.

MARY ELLEN CARTER GROGAN
3428 Ashley Terrace, N.W.

WILHELMINA VINCEL HETZEL
3625 Yuma Street, N.W.

ARTHUR W. JACKSON
6904 32nd Street, N.W.

ROBERT GRAYSON McGUIRE, JR.
1611 Crittenden Street, N.W.

WILLIAM WARFIELD ROSS
3320 Rowland Place, N.W.

All of Washington, D.C.

Plaintiffs

v.

Civil Action
No. 2885-67

COMMISSIONER OF DISTRICT
OF COLUMBIA,
Walter E. Washington.

DISTRICT OF COLUMBIA
COUNCIL,

John W. Hechinger, Chairman
of District of Columbia Council

Walter E. Fauntroy, Vice-Chairman
of District of Columbia Council

Stanley J. Anderson, Member
of District of Columbia Council

Margaret A. Haywood, Member
of District of Columbia Council

John A. Nevius, Member
of District of Columbia Council

J. C. Turner, Member
of District of Columbia Council

Polly Shackleton, Member
of District of Columbia Council

Joseph W. Yeldell, Member
of District of Columbia Council

each at the
District Building
1350 E Street, N.W.
Washington, D. C.

Defendants.

COMPLAINT FOR PRELIMINARY AND PERMANENT INJUNCTION AND FOR A DECLARATORY JUDGMENT

(To Restrain Enforcement by the Commissioner of Various Acts Relating to the District of Columbia and to Restrain the Enactment of Regulations by the City Council of the District of Columbia.)

1. Jurisdiction of this Court is invoked under Title 11-521 of the District of Columbia Code.

2. This is a class action brought by the plaintiffs, on behalf of themselves and of other similarly situated citizens of the District of Columbia, to obtain a judgment declaring that Reorganization Plan No. 3 of 1967 which vests executive and legislative power in the municipal corporation of the District of Columbia in the defendants is in conflict with the Tenth Amendment to the Constitution, and for an injunction to restrain the enforcement of Reorganization Plan No. 3 of 1967, which purports to authorize the defendants to exercise specified executive and legislative powers.

3. The plaintiffs were each born in the District of Columbia and are each residents, adult citizens, and qualified voters in the District of Columbia.

4. Defendant, Commissioner of the District of Columbia, has been vested with all executive power over the government of the District of Columbia, with all functions of the predecessor President of the Board of Commissioners, and with all functions of each other predecessor member of the Board of Commissioners.

5. Defendant, Walter E. Washington, is the Commissioner of the District of Columbia, appointed by the President of the United States pursuant to the provisions of Section 301 (b) of Reorganization Plan No. 3 of 1967.

6. Defendant, the District of Columbia Council, has been vested with power to perform specified legislative, regulatory, and ordinance-making functions for the municipal corporation of the District of Columbia, pursuant to Sections 402, 403, 405, and 406 of Reorganization Plan No. 3 of 1967.

7. Defendant, John W. Hechinger, is the Chairman of the District of Columbia Council, appointed by the President of the United States, pursuant to the provisions of Section 201 (b) of Reorganization Plan No. 3 of 1967.

8. Defendant, Walter E. Fauntroy, is the Vice Chairman of the District of Columbia Council, appointed by the President of the United States, pursuant to the provisions of Section 201 (b) of the Reorganization Plan No. 3 of 1967.

9. Defendants, Stanley J. Anderson, Margaret A. Haywood, John A. Nevius, J. C. Turner, Polly Shackleton, and Joseph P. Yeldell, are each members of the District of Columbia Council, and together with Defendants, John W. Hechinger and Walter E. Fauntroy, are charged with exercising the legislative, regulatory and ordinance-making functions set forth in Sections 402, 403, 405, and 406 of Reorganization Plan No. 3 of 1967.

10. Congress was granted power by the people of the United States to exercise exclusive legislation

over the territory which thereafter was to comprise the District of Columbia, Pursuant to the provision of Article I, Section 8, Clause 17 of the United States Constitution, effective March 4, 1789.

11. The exercise of the legislative power of Congress over the District of Columbia was expressly limited by the enactment of the Ninth and Tenth Amendments to the Constitution, effective December 15, 1791, so as not to deny or to disparage the rights retained by the people and so as to reserve to the people powers not delegated to the United States by the Constitution.

12. The Commonwealth of Virginia and the State of Maryland ceded certain territory to the Congress and to the Government of the United States subject to the proviso that the jurisdiction of the respective states over such territory was to be preserved until Congress provided for the Government within the ceded territory. The cession of land including that provision, was accepted by Congress pursuant to the provisions of 1 Stat. 139 (1790), pp. xxv-xxvi of the District of Columbia Code, and was made effective on the first Monday of December, 1800.

13. On the date of such cessions, the people who inhabited the ceded territories maintained municipal corporations and county governments and possessed the right to elect the officers of the municipal corporations and county governments in the municipal corporations of Alexandria, Virginia, and Georgetown, Maryland, and in Montgomery and Prince Georges Counties in Maryland.

14. The Act to Incorporate Georgetown in Montgomery County, Maryland, was enacted on December 25, 1789, by the State of Maryland, and thereafter continued in effect, with successive amendments by the State of Maryland and by the Congress of the United States until 1871, when the municipal corporation of Georgetown was abolished and territory which comprised Georgetown was incorporated with

other territory in the District of Columbia as one municipal corporation. Throughout such period from 1789 to 1871, the citizens of the municipal corporation of Georgetown possessed the right to elect their municipal officers, and such right was continued in 1871 pursuant to the provisions of the Act to Provide a Government for the District of Columbia, 16 Stat. 419 (1871), pp. xlv-lii of the District of Columbia Code.

15. A municipal corporation, with a government elected by the citizens of the city of Washington, was established by the Act of 1802 to Incorporate the City of Washington, 2 Stat. 195 (1802), pp. xxviii-xxix of the District of Columbia Code and was maintained by successive amendatory Acts until 1874.

16. The statutes referred to in paragraphs 14 and 15 were enacted pursuant to the provisos of the Act of Cession of the State of Maryland and pursuant to the provisions of the Ninth and Tenth Amendments to the Constitution.

17. The previously existing elected government for the District of Columbia was abolished in 1874 pursuant to the provisions of the Temporary Organic Act of 1874, 18 Stat. 116 (1874), pp. l-lii of the District of Columbia Code and of the Organic Act of the District of Columbia, 20 Stat. 102 (1878), pp. liii-lv of the District of Columbia Code. In its stead certain legislative and executive powers were vested in three commissioners who were selected by the President of the United States and who, to the exclusion of any elected representatives of the citizens of the District of Columbia, were the officer of the municipal corporation of the District of Columbia, until November 3, 1967.

18. Plaintiffs have suffered and are continuing to suffer irreparable injury and damage by being deprived, as citizens of the District of Columbia, of the opportunity to elect the officers of their municipal corporation, in that, inter alia,

(a) The defendants are given the power pursuant to the Joint Resolution of February 26, 1892, 27 Stat. 394 (1892), 1-226 of the District of Columbia Code, "to make and enforce all such reasonable and usual police regulations. . .as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property within the District of Columbia, and they exercise such power without being accountable to the people of the District of Columbia".

19. Effective November 3, 1967, Reorganization Plan No. 3 of 1967, abolished the Board of Commissioners and the positions of each of the three commissioners authorized by the Organic Act of the District of Columbia, 20 Stat. 102 (1878), Sec. 1-201-202 of the Code of the District of Columbia, and authorized in their stead the "District of Columbia Council" comprised of a Chairman, a Vice Chairman, and seven other members all appointed by the President of the United States and the "Commissioner of the District of Columbia" appointed by the President of the United States.

20. The power of the people of the District of Columbia to elect their municipal executive and legislative officers has not been delegated by any provision in the Constitution to the President of the United States. Reorganization Plan No. 3 of 1967 is in conflict with the 10th Amendment to the Constitution in that it purports to vest in the President of the United States a power which has been reserved to the people of the District of Columbia.

21. Plaintiffs have suffered and are continuing to suffer irreparable injury and damage by being deprived, as citizens of the District of Columbia, of the opportunity to elect the officers of their municipal corporation, in that, inter alia,

(a) The defendants are given the power pursuant to the Joint Resolution of February 26, 1892, 27 Stat. 394 (1892), 1-226 of the District of Columbia

Code, "to make and enforce all such reasonable and usual police regulations. . .as they may deem necessary for the protection of lives, limbs, health, comfort and quiet of all persons and the protection of all property within the District of Columbia," and they exercise such power without being accountable to the people of the District of Columbia;

(b) The defendants are given the powers pursuant to 47-211 and 501 of the District of Columbia Code to submit estimates for the expenses of the District of Columbia government to Congress, and after appropriation for such expenses by Congress, to fix annually a rate of taxation to produce revenues toward the payment of such expenses, and they exercise such power without being accountable to the citizens of the District of Columbia;

(c) The defendants are given the power pursuant to the Act of June 14, 1878, 20 Stat. 131 (1878), 1-228 of the District of Columbia Code, to make and enforce such building regulations as they deem advisable, and they exercise such power without being accountable to the people of the District of Columbia;

(d) The defendants are given numerous other powers relating to the exercise of their duties as officers of the municipal corporation of the District of Columbia, and they exercise such powers without being accountable to the citizens of the District of Columbia.

WHEREFORE, The Plaintiffs each request:

(1) An injunction to restrain the defendants, John W. Hechinger, Walter E. Fauntroy, Stanley J. Anderson, Margaret Haywood, John A. Nevius, J. C. Turner, Polly Shackleton, and Joseph P. Yeldell, individually and collectively as the District of Columbia City Council, from exercising any legislative, regulatory, or rule making powers vested in the District of Columbia City Council by Reorganization Plan No. 3 of 1967.

(2) An injunction to restrain the defendant, Commissioner of the District of Columbia, and the defendant, Walter E. Washington, as the Commissioner of the District of Columbia, from exercising any of executive power over the District of Columbia.

(3) A judgment declaring that those provisions of Reorganization Plan No. 3 of 1967 which vest legislative, rule-making, regulatory, and executive powers in the defendants are in conflict with the Tenth Amendment to the Constitution and are null and void.

(4) For such other and further relief as is appropriate.

[Signatures omitted in printing]

Plaintiffs

[Caption omitted in printing]

MOTION OF DEFENDANTS TO DISMISS THE COMPLAINT OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

The defendants move the Court to dismiss the complaint on the ground that it fails to state claims against them upon which relief can be granted. In the alternative, the defendants move the Court to enter summary judgment in their favor on the ground that a reading of the pleadings, together with the Reorganization Plan No. 3 of 1967, attached hereto as Exhibit "A" and by reference made a part hereof, demonstrates that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law.

[Signatures omitted]

[Caption omitted in printing]

MOTION TO AMEND COMPLAINT

Plaintiffs move to amend the complaint herein to state a further prayer for relief, namely the plaintiffs request a judgment declaring that Sections 201 (b) and 301 (b) of the Reorganization Plan No. 3 of 1967, are in conflict with the due process clause of the Fifth Amendment to the United States Constitution.

[Signatures omitted
in printing]

[Caption omitted in printing]

MOTION FOR SUMMARY JUDGMENT

Plaintiffs move for summary judgment, there being no issues of fact and the plaintiffs being entitled to a judgment as a matter of law.

[Signature omitted
in printing]

[Caption omitted in printing]

ORDER

Upon motion of the plaintiffs to amend the complaint filed herein, and it appearing that no opposition to plaintiffs' motion has been filed, it is by this Court this 19th day of February, 1968

ORDERED that the plaintiffs motion to amend complaint be and it is hereby granted.

/s/ George Hart
Judge.

[Caption omitted in printing]

ORDER

Upon consideration of the complaint filed herein, as amended, the motion of the plaintiffs for summary judgment and the motion of the defendants to dismiss the complaint or, in the alternative, for summary judgment, the memoranda of points and authorities cited in support thereof, and oral argument of counsel in open court on February 9, 1968, it is, by the Court this 19th day of February, 1968,

ORDERED:

1. That the motion of the defendants for summary judgment be, and the same is, hereby denied.

2. That the motion of plaintiffs for summary judgment be, and the same is, hereby denied.

3. That the motion of the defendants to dismiss the complaint, as amended, be, and the same is, hereby granted.

/s/ George Hart
Judge

NOTE OF APPEAL COMES HERE - TO BE FURNISHED

JA 11

APPROACHES TO LOCAL GOVERNMENT IN THE DISTRICT OF COLUMBIA

1789-1820

Dr. Marion L. Kenney

I. CONCLUSIONS

A considerable variety of historical material has been examined for evidence of the intentions of the Framers of the Constitution and the expectations of the general public as to the operation of Article I, Section 8, with respect to the District of Columbia:

> The Congress shall have power . . . to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of government of the United States.

This search included general studies of customary local government in the late eighteenth century, spot checks of contemporary newspapers and pamphlets, records of the Constitutional Convention of 1787, debates in the state constitutional conventions, and collections of letters down to the assumption of jurisdiction over the District of Columbia, by Congress in 1801, and provision, in 1802, of a corporate government for the City of Washington.

It is clear that, in spite of the unequivocal wording of Section 8, the delegates to the Constitutional Convention never had the slightest idea of depriving the District of responsible local self-government. They were, however, convinced from past experience that Congress, rather than any state or states, must have jurisdiction in the Federal Capital. It was felt that details of local government could be left to future Congresses. From whatever state the Convention delegates came, they had, one and all, lived in communities which accepted as normal the idea of self-governing municipalities incorporated originally

under colonial governments and, since the Declaration of Independence, under state legislatures. Therefore, inasmuch as it would be ten years before a new capital city could be occupied, no anxiety was felt about leaving the relatively minor matter of the government of the Federal district to the discretion of Congress.

Upon ratification, Maryland and Virginia promptly offered and Congress accepted cession of the famous "ten miles square." The rights of the inhabitants were protected in the act of acceptance by allowing them to live under their respective state laws until Congress should transfer the seat of government to the District of Columbia. The most convincing reassurance as to the intention of the Framers with regard to the government of the District had already been given by Madison in Number 43 of the Federalist Papers during the campaign for ratification:

> as a municipal legislature for local purposes, derived from their own suffrages will of course be allowed them . . . every imaginable objection seems to be obviated.

Once the Constitution had gone into operation, little attention seems to have been given to the matter until December, 1800, when Congress met in Washington for the first time, and President Adams laid the problem before it in his final address.

The first debates on the District of Columbia took place in December, 1800, and January and February, 1801. They centered first on whether and when, if ever, Congress should assume jurisdiction. Many members opposed assumption because it would involve the loss of participation in national politics. In the end, however, Congress decided upon assumption of full responsibility and divided the District into Washington and Alexandria Counties for "better local government."

This was followed by a series of debates on the form of local government to be established. Much of

the time was given to a plan of government closely modeled on the Federal Government. In this connection, many Members were disturbed over what they considered too high suffrage qualifications, and over the provision of biennial elections which they thought were not sufficiently frequent for democratic government. The bill which had provided for an elected two-chamber legislature, and appointive executive and judiciary officers, failed to pass in this session.

Practically all speakers in these two series of debates displayed a deep concern with protecting the political rights of the inhabitants of the District. In 1802, however, a quite different approach to the problem of local government was taken.

There were already two incorporated cities in the District whose charters had been confirmed by Congress when it accepted cession. It was now decided to promote the City of Washington to a nearly equal status. By this act, Congress brought about 7600 out of 10,200 free white inhabitants of the District of Columbia under essentially independent self-government, though Washington was not permitted to elect its mayor directly until 1820. In 1803 several proposals for retrocession were made and discussed in Committee of the Whole House in the House of Representatives. Three points touching on political rights were raised: that the inhabitants of the District were deprived of their political rights; that Congress was incompetent to legislate because its members were strangers to its local interests; and that exclusive legislative control by Congress was an example of government without representation dangerous to the liberty of the United States. Those opposed to retrocession contended that when the District became sufficiently populous it would have a representative in Congress, and in the meantime it would have a local legislature. Representatives from five states rose to speak in behalf of the political rights of District inhabitants though, as in previous debates, there was

disagreement as to how such rights could be insured. Retrocession was defeated but, in 1804 and 1805, Congress made attempts to ameliorate the situation by liberalizing the charters of the District cities. Subsequently Washington's charter became increasingly generous. In 1812 the city Council was permitted to elect the mayor, and in 1820 qualified voters were permitted to elect the mayor directly for a two-year term. This was continued down to 1871.

Throughout the early Congresses it seems to have been generally accepted that the Constitution precluded District participation in the national government, but that the largest practicable measure of local self-government should be granted to it.

II. LOCAL SELF-GOVERNMENT; ATTITUDES AND PRACTICES

a. In the Colonies

Early in colonial life, urban centers began to develop. Carl Bridenbaugh has described the development of five of the earliest in two volumes.[1] He shows that town governments up to 1690 were hampered "by the fact that the powers and functions of municipal corporations were but imperfectly conceived, and hazily defined. They were limited by the medieval conception of a charter which conveyed only the barest bones of power. . . .Moreover, the civic power was yet feeble, it was frequently forced to call on private aid to supplement it in many cases, where today it is all-sufficient." In America, however,

> It does seem from the evidence now available that public spirit . . . which in English towns at that time was nearly extinct, prevailed to

---

[1] Carl Bridenbaugh, Cities in the Wilderness: the First Century of Urban Life in America, 1625-1742 (New York, 2nd ed., 1955), and Cities in Revolt: Urban Life in America, 1743-1776 (New York, 1955).

> a greater extent in America . . . and in many respects these new towns with their feeble resources were better served than any English municipality save London.[2]

Between 1690 and 1720, economic progress made possible considerable expansion in the towns, and a sense of civic responsibility was evident in individual and private group activities.

The twenty years between 1720 and 1742 were years of peace and prosperity during which there developed great need for the town governments to assume more responsibilities, but there was little change in municipal institutions except that the Governor of New York confirmed the charter of the Corporation of New York and granted it additional privileges and concessions. The Governor, however, retained the right to appoint the mayor and other municipal officers:

> Elsewhere attempts to alter existing forms of government proved abortive, but these attempts revealed three urgent municipal needs: popular control, administrative efficiency, and financial independence.[3]

The Philadelphia corporation had become so aristocratic and financially inept that the inhabitants petitioned the Assembly unsuccessfully to place the collection of taxes and other corporate powers in the hands of elected commissioners and assessors.

Charleston, in 1722, got an Act of Incorporation through the South Carolina Assembly, but the merchants and planters got it disallowed; only the power to elect a few town officials was saved.

Around Boston and Newport, small communities and country folk petitioned to have Boston and New-

---

[2]Bridenbaugh, Cities in the Wilderness, pp. 136-137, 279.

[3]Ibid., pp. 304-305.

port separated from the surrounding county areas but were denied.

In the provinces of Maryland and Virginia, authorities quickly set up county and parish institutions from the very first. As soon as a region acquired enough individuals to warrant it, local self-government through parish and county was arranged, and numerous acts were passed to create towns.

The Carolinas were slower, but by 1776 North Carolina had sixteen county governments between the fall line and the Great Smokies, with parish vestries in each county.[4]

> The preponderance of political power was exercised in towns, parishes, counties, and boroughs . . . and these entities were even more independent of the colony than the colony of the Crown. Self-government was doubly the rule in colonial America.[5]

Only a fraction could participate, and even a lesser fraction did; the colonies were still well ahead of practice in almost all other countries; and many men never cared one way or the other about the exercise of political power:

> In a society where men could "move on" and where land was cheap and plentiful the privilege of the suffrage was something any man could win. Even in aristocratic New York and South Carolina, men of mean birth and menial

---

[4]Carl Bridenbaugh, Myths and Realities: Societies of the Colonial South (New York, 1963).

[5]Clinton L. Rossiter, Seedtime of the Republic: the Origin of the American Tradition of Political Liberty (New York, 1953), p. 16.

occupation could aspire to political power and prominence.[6,7]

Both the fact and tradition of local self-government bear the stamp of colonial experience:

> The flourishing condition of such institutions in colonial times was at once a factor in the evolution of a democratic faith and evidence of the progress of American liberty . . . . In general the central governments of the colonies exercised even less control over local institutions than did the mother country over the colonies.[8,9]

> The overall pattern of local government was typically colonial, exhibiting primitive diversity in the seventeenth century, maturing uniformity in the eighteenth century, and sharp differences always between North and South, frontier and seaboard, city and village.[10]

> These common features of local government in the colonies should be noted; the broader suffrage for local than for colony-wide elections, the multiplicity of unpaid offices and duties,

---

[6] Ibid., p. 21.

[7] Rolls of Freemen Admitted in New York City, 1695-1705, in New York Historical Society Collection (1885), pp. 39-213.

[8] Rossiter, Seedtime of the Republic, p. 24.

[9] G. E. Howard, An Introduction to the Constitutional History of the United States (Baltimore, 1889); and E. Channing, Town and County Government of the English Colonies in North America (Baltimore, 1854), pp. 55-57.

[10] Rossiter, Seedtime of the Republic, p. 25.

> a system under which a much greater percentage of the citizens performed at least some sort of public duty than is the case today; the healthy publicity that went along with "government by friends and neighbors"; the limited scope of action and service as contrasted with modern local government; and the devotion of the average man's political attention to affairs of town rather than colony.[11]

1. New England

Local self-direction and the influence of corporate forms of government were pervasive in New England. The basic units were the county in which the officers were appointed by the governor and no representative body ever arose or was demanded, and the towns:

> which dealt pragmatically with prudential affairs: care of highways, poor relief, preservation of the peace, elementary education, land disposal and registration, assessment and collection of taxes and tithes, and just about any matter of local interest.
>
> Although colonial assemblies passed many laws dealing with the organization and powers of the towns, these units were in fact quite independent of central control. More important they were self-governing in the most obvious sense, through the famous town meeting, the selectment, and a host of unpaid minor officials . . . all chosen from and by the citizenry. In 1720 an average Massachusetts town, Ipswich, had ninety-seven regular officials . . . the town was a species of artless democracy, however limited; it was a far more popular scheme of government than local institutions in the homeland; and it provided

---

[11] Ibid., p. 27.

> for those who took part . . . important schooling in the techniques of political freedom.[12]

2. Southern Colonies

Local government in the Southern colonies was aristocratic, even oligarchical in character without elective officers of representative bodies, both parish and county units being governed by closed, self-perpetuating organs of gentry. Nevertheless, Rossiter considers that,

> in the vital tests of self-reliance and freedom from central supervision, the counties and parishes—and of course the plantations—of Virginia and South Carolina were as typically colonial as the towns of New England. The select vestries of Bristol and Stratton Major were not too different in character from the selectment of Little Compton and Simsbury. The records give much substance to Jefferson's observations on the vestrymen. "These are usually the most discreet farmers, so distributed through their parish, that every part of it may be under the immediate eye of some one of them. They are well acquainted with the details and economy of private life, and they find sufficient inducements to execute their charge well, in their philanthropy, in the approbation of their neighbors, and the distinction which that gives them."[13]

Rossiter remarks that the "publicity of familiarity" was apparently as salutary a check on the parish clerk in Virginia as was the town meeting on the town clerk in Massachusetts.

---

[12] Ibid., p. 25.

[13] Ibid., p. 26.

3. New York and Pennsylvania

Rossiter says that the middle colonies went through their own processes of evolution which led to the selection of the county as the principal unit of government which was less popular than in the Northern Colonies but "less select" than in the South. Here, too, there was a considerable degree of self-determination by the end of the colonial period.[14]

4. Two Types of Cities

There were two special types of local government, each of which was fairly uniform through most of the colonies: government in the incorporated city, and government on the frontier.

> Boston, Baltimore, New Haven, Newport, Charleston—were governed through most or all of the colonial period under much the same forms as were their small neighbors.[15] Others —including such important centers as New York, Albany, Philadelphia, Annapolis, Norfolk and Williamsburg, and a dozen or so lesser communities—were granted charters of incorporation. Several of these were "close" corporations, in which mayor, councilors, alderman, and other officials were empowered to choose their own successors. The majority, however, enjoyed charters of a more popular character. In New York, for example, councilors and aldermen were elected by the freemen and freeholders of the borough. Colonial incorporations exercised almost complete control over their

---

[14] Ibid., p. 26.

[15] E. S. Griffith, History of American City Government: The Colonial Period (New York, 1908). For a good bibliography, see J. A. Fairley, Essay on Municipal Administration (New York, 1908), pp. 48-94.

> own affairs, and in several of them political activity reached its peak in the colonial period.[16]

5. The Frontier

The scheme of self-government on the advancing frontier

> was a tremendous spiritual if not institutional force in the development of American democracy. . . .Records tell us that a practical, practical, primitive householders' democracy, grounded in the fact and theory of free consent, was the usual form of government in almost every English settlement except Massachusetts Bay . . . . The general picture is one of the barest bones of government. . . . When organs of town, parish, or county government were set up in the settlements, they were cast in a rudely popular mold. The institutions were those of the tidewater, but the spirit and the suffrage were those of the democratic frontier.[17]

b. Comparison with Local Government in England

During the debates on ratification of the Constitution in the Virginia Convention, one of the delegates made scathing reference to the conditions in English cities where citizens were not responsible, and Bridenbaugh confirms the superiority of American cities over English municipalities save London.[18]

---

[16]Rossiter, Seedtime of the Republic, p. 26; and Minutes of the Common Council of the City of New York, 1670-1776, 8 vols. (New York, 1905); and Minutes of the Common Council of the City of Philadelphia, 1704-1776 (Philadelphia, 1847).

[17]Rossiter, Seedtime of the Republic, p. 27.

[18]Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitu-

English students of local government have frequently been critical. J. H. Hammond has said:

> At the time of the passing of the Municipal Corportations Act (in the 1830's), the English towns were sunk in a condition of barbarism that would have put a citizen of the Roman Empire to the blush. They had none of the amenities, few of the decencies of civilization.[19]

In the same collection of essays, W. Ivor Jennings quotes Sidney and Beatrice Webb:

> The most common and striking defect in the constitutions of England and Wales, is that the corporate bodies exist independently of the communities among which they are found. The Corporations look upon themselves and are considered by the inhabitants as separate and exclusive bodies . . . in most cases all identity of interest between the corporation and the inhabitants has disappeared.[20]

c. From the Declaration of Independence to the Constitutional Convention

No one has written more eloquently than Alexis de Tocqueville of the changes which took place in the United States following the Declaration of Independence:

> Not all the public functionaries were chosen by popular vote, nor were all the citizens

---

tion as Recommended by the General Convention at Philadelphia in 1787, 2nd ed., Vol. III (Philadelphia, 1866), p. 20; and Carl Bridenbaugh, Cities in Revolt, pp. viii and 420.

[19] Harold Laski, ed., A Century of Progress: the Last Hundred Years (London, 1936), p. 31.

[20] Ibid., p. 58

> voters. The electoral franchise was everywhere somewhat restricted and made dependent upon a certain qualification, which was very low in the North and more considerable in the South.
>
> The American Revolution broke out, and the doctrine of the sovereignty of the people came out of the townships and took possession of the state. Every class was enlisted in its cause; battles were fought and victories obtained for it; it became the law of laws.[21]

He makes an acute analysis of the conditions necessary for maintaining municipal independence, which proved to be prophetic with regard to the District of Columbia:

> But although the existence of the township is coeval with that of man, its freedom is an infrequent and fragile thing. . . . The difficulty of establishing its independence rather augments than disminishes with the increasing intelligence of the people. A highly civilized community can hardly tolerate a local independence, is disgusted with its numerous blunders, and is apt to despair of success before the experiment is completed. . . . Again the immunities of townships which have been obtained with such difficulty, are least of all protected against the encroachments of the supreme power . . . and they can not defend themselves with success unless they are identified with the customs of the nation and supported by public opinion.[22]

During the period between 1776 and 1787 belief that all government ought to be based upon the consent of

---

[21] Alexis de Tocqueville, Democracy in America, ed. Phillips Bradley, Vol. I, pp. 56-57.

[22] Ibid., p. 60.

the governed had been increasingly incorporated into law and custom. Merrill Jensen asserts that in the eighteenth century the demand for centralization and states' rights meant local self-government, and local self-government meant a form of agrarian democracy:

> Needless to say, the motives of the radicals were not always the highest or the most disinterested, but their program was essentially democratic in tendency for it widened the the bases of political power and it declared that men should be bound only by those laws to which they had given their consent.[23]

The extent to which local self-government came to be accepted as imperative by 1787 has been shown by numerous monographs published in recent years.[24] It is implicit also in Madison's famous statement on the clause in the Constitution relating to the future seat of government:

> The indispensable necessity of complete authority at the seat of government, carries its own evidence with it . . . . Without it, not only the public authority might be insulted and its proceedings be interrupted with impunity, but a dependence of the members of the general government on the state comprehending the seat of government, for protection in the ex-

---

[23]Merrill Jensen, The Articles of Conferation: an Interpretation of the Social-Constitutional History of the American Revolution, 1774-1781 (University of Wisconsin Press, 1948), pp. 204-205.

[24]For example, Charles S. Grant, Democracy in the Connecticut Frontier Town of Kent (New York, 1961); Robert E. Brown, Middle-Class Democracy and the Revolution in Massachusetts, 1691-1780 (Ithaca, N.Y., 1955); and numerous other studies of individual colonies or states.

> ercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonourable to the government and dissatisfactory to the other members of the confederacy. This consideration has the more weight, as the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single state, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence. The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the state ceding it; as the state will no doubt provide in the compact, for the rights, and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest, to become willing parties to the cession; as they will have had their voice in the election of the government, which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the state, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the state, in their adoption of the constitution, every imaginable objection seems to be obviated.[25]

d. Trends after 1787

Tocqueville, writing some forty years after ratification of the Constitution, can hardly speak more emphatically of the attachment of the people to the principle of local self-government:

---

[25] The Federalist, No. 43.

> Local assemblies of citizens constitute the strength of free people. . . . A nation may establish a system of free government, but without the spirit of municipal institutions it can not live in the spirit of liberty.
>
> Municipal independence in the United States is, therefore, a natural consequence of the very principle of the sovereignty of the people . . . and among the inhabitants of New England I believe that not a man is to be found who would acknowledge that the state has any right to interfere in their town affairs. . . . Without power and independence a town may contain good subject, but it can have no active citizens.
>
> The laws differ and their outward features change, but the same spirit animates them . . . and it is at least true that in the United States, the county and the township is always based upon the same principle: namely that everyone is the best judge of what concerns himself alone, and the most proper person to supply his own wants. All magistrates are chosen by the inhabitants, or at least from among them.[26]

Thus, the tradition of strong, independent local self-government was still strong in Tocqueville's day. No such notable gap in the universal application of the rule as the present situation in the District of Columbia was observed by Tocqueville. In fact he would have found such a situation incredible on the basis of his knowledge of general practice in the United States. As a modern authority has stated it:

> Having recently fought a war with England on the principle of "No taxation without representation" it was considered only appropriate that the inhabitants of the District of Colum-

---

[26] Tocqueville, Vol. 1, pp. 65-67 and 81.

bia, though not residing in a state, and, therefore, not entitled to elect senators and representatives in Congress or members of the electoral college, should be given a measure of self-government.[27]

III. ATTITUDES CONCERNING THE GOVERNMENT TO BE ESTABLISHED IN THE DISTRICT OF COLUMBIA

a. The Constitutional Convention

By the time that the Constitution was proposed the doctrine that citizens should be bound only by laws to which they had given their consent was accepted as a practical working rule throughout the United States, though at that time it was modified by higher suffrage qualifications than is usual today.[28]

No one in Congress or in the Convention had at first any thought of depriving the inhabitants of the future seat of Government of their political rights; but as the project for a federal government evolved, it seemed necessary that voting, like every other element in the plan, should be keyed to citizenship in a state. On the other hand, it was inconceivable to everyone that the "ten miles square" should be treated as a fourteenth state. Thus, there appeared to be no way to provide for participation of the inhabitants of the new District in national elections—though a few persons later suggested an amendment to the Constitution.[29]

---

[27] Harold Zink, Government and Politics in the United States (New York, 1950), p. 918.

[28] A. E. McKinley, The Suffrage Franchise in the Thirteen English Colonies in America (Philadelphia, 1905).

[29] Museum and Washington and Georgetown Advertiser (Georgetown, February 4, 1801), p. 2, Letter from Epaminondas.

In the existing records of the Constitutional Convention there are only three or four passages that refer to the future seat of government. The most extensive of these were several proposals during the last week of July, 1787. It was then unanimously resolved that the committee should be instructed to accept clauses which would prevent the seat of the national government from remaining in the capital of any state longer than necessary to erect the public buildings which would be required. Colonel Mason proposed that a state capital should be avoided because of the possibility of disputes over jurisdictions, and because the intermixture of two legislatures "tended to give a provincial tincture" to the national deliberations; Langdon feared that a state might move its capital after the Federal Capital was established, but another delegate thought this could be avoided by delaying construction. At length all provisions proposed since Monday of that week were unanimously referred to the Committee of Detail, and the Convention adjourned until Monday, August 6, in order to give the Committee of Detail "time to report the Constitution."[30]

On August 18, a series of additional powers "pro posed to be vested in the Legislature of the United States" were referred to the Committee. These included provisions for fixing and permanently establising the seat of Government of the United States "in which they shall possess the exclusive right of the soil and jurisdiction."[31]

All indications are that the delegates to the Convention were concerned for the dignity and prestige of the national government, partly because the gov-

---

[30]Max Farrand, ed., The Records of the Federal Convention of 1787, revised ed., 4 vols. (New York, 1937), Vol. II, p. 127.

[31]Ibid., Vol. II, p. 321.

ernment of the Confederation had been plainly lacking in this respect.[32]

b. The Federalist

Between October, 1787, and August, 1788, Alexander Hamilton, John Jay, and James Madison published a series of articles under the joint name of Publius, and the title of The Federalist, with the aim of persuading voters in the various states to choose delegates to the state conventions who would vote to ratify the Constitution. These articles set forth extensive explanations and interpretations of the proposed Constitution. The only paragraph devoted explicitly to the future seat of government has already been quoted on page 16. In it the clause "as a municipal legislature for local government derived from their own suffrages will of course be allowed them" (the citizens of the area) appears to be an unequivocal assurance by Madison, who played the major part in the drafting and was the most anxious for the ratification of the Constitution.

It is true that the Constitution was modified within the first year or two, but Madison himself accepted the additional protection of civil rights in the Bill of Rights, and it is reasonable to suppose that he would have approved an amendment to support his statement about local government in the future capital, had he supposed it necessary. It seems quite clear that local self-government was so universally accepted that it seemed unnecessary to specify it. Most amendments

---

[32]The Continental Congress had been forced to move six or seven times during the Revolutionary War, and under the Confederation it had found it expedient to sit in Princeton, Annapolis, Trenton, New York, and Philadelphia. See William Tindall, Compiler by direction of the Commissioners of the District of Columbia, Origin and Government of the District of Columbia (Washington, D. C., 1916).

covered rights which had sometimes been encroached upon by England.

c. The State Ratifying Conventions

In the state ratifying conventions, the sessions of the Virginia convention were far the most lengthy. Patrick Henry opposed the Constitution bitterly and wildly, and of course fastened on the clause giving Congress power of exclusive legislation in the Federal City. Grayson feared that Congress might give exclusive powers to merchants living there, and that finally "the whole commerce of the United States would be centered in ten square miles."[33] Mason was even more emphatic. He thought there were few clauses in the Constitution more dangerous. He was willing to give Congress exclusive power in the area as far as policing and good government went, but no other powers:

> This square mile may set at defiance the laws of the surrounding states and become a sanctuary of blackest crimes. . . . What ch nce will poor men get when Congress have the power of legislating in all cases what ever, and when judge and jury may be under the influence and bound to support their operation. Even with juries the chance of justice may be very small as Congress have unlimited authority, legislative, executive, and judicial. Lest this power should not be sufficient they have it in every case. Now, sir, if an attempt should be made to establish tyranny over the people, here are ten miles square where the greatest offender may meet protection. . . . All he has to do is get into the ten mile square. . . . Why

---

[33] Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 (Philadelphia, 1866), Vol. III.

> was this dangerous power given? I do not think this power at all necessary.[34]

Madison in reply said he could not comprehend that the power of legislating over a small district would involve such dangers, and asked how otherwise the government could be guarded from undue influence of particular states, or from insults. He believed the evils suggested to be highly improbable.

Several pages later Patrick Henry returned to the subject to inquire if it was consistent with "any principle of prudence or good policy to grant unlimited, unbounded authority which is so totally unnecessary that the gentlemen say it will never be exercised?"[35]

Madison was evidently surprised by the opposition to the provisions for the Federal territory and did not consider the arguments in opposition either valid or significant:

> I did conceive, sir, that the clause under consideration was one of those parts which would speak its own praise. Strike it out of the system, and let me ask whether there would not be much larger scope for those dangers. . . . I cannot comprehend that the power of legislation over a small district which may not be more than one mile will involve the danger which he apprehends. I should think it would be the last thing that would enter into the mind of any man to grant exclusive advantages in a very circumscribed district, to the prejudice of the community at large. Is it possible that the members from Georgia, New Hampshire, etc., will concert to sacrifice the privileges of their friends?[36]

---

[34] Ibid., Vol. III, p. 431.

[35] Ibid., Vol. III, p. 437.

[36] Ibid., Vol. III, p. 432.

He added that other states would be jealous if the national capital were located in one of them, and that it was urgent to protect the sessions and deliberations of Congress from state control — always a decisive consideration in Madison's eyes.

Grayson replied that his party was not satisfied with "improbability" when they considered the great attachments men have to a great and magnificient capital. Citizens of that district would aggrandize themselves to the injury of the other states. He also raised the question of the application of the Fugitive Slave Law which was applicable to the states but possibly not to the Federal district:

> It was often in contemplation of Congress to have power of regulating the police of the seat of government, but they never had an idea of exclusive legislation in all cases. The power of regulating the police and good government of it will secure Congress against insults. What originated the idea of the exclusive legislation was some insurrection in Pennsylvania whereby Congress was insulted, on account of which it is supposed they left the state.[37]

Patrick Henry pointed out that there was a discrepancy between laws in the states and in the district, in that Congress could excuse the people from burdens imposed on the rest of society.

Finally Pendleton rose in defense of the clause. He contended that the clause gave Congress no power to make regulations in the Federal district that would affect the interests of the citizens of the Union at large, but gave it power of the local police in order to be secure from interruption of its proceedings:

---

[37] Ibid., Vol. III, p. 433.

> Notwithstanding the violent attack upon it, sir, this is a fair construction. It gives the power of exclusive legislation in any case within that district. What is the meaning of this? What is it opposed to? Is it opposed to the general powers of the federal legislature, or to those of the state legislatures? I understand it to be opposed to the legislative power of that state where it shall be.
>
> What then is the power? It is that Congress shall exclusively legislate there, in order to preserve the policies of the place and their own personal independence, that they may not be overawed or insulted, and of course to preserve them in opposition to any attempt by the state where it shall be. . . . The exclusive power is limited to that place solely, for their own preservation, which all gentlemen allow to be necessary.[38]

Madison's confidence that Congress could always be counted on to respect the principle of local self-government in the Federal district is a little surprising. He evidently believed it to be solidly based on experience, for he was quoted by Yates (in his Minutes of the Constitutional Convention addressed to the Maryland ratifying convention) as stating his belief that none of the state governments ever encroached on the corporate rights of cities.[39] Yates does not mention the connection in which this question arose

---

[38] Ibid., Vol. III, p. 439.

[39] As mentioned on page 18, the universal acceptance of local self-government and its freedom from interference on the part of colonial and state governments did not prepare the Framers of the Constitution for the possibility of encroachment by Congress on the rights of the inhabitants of the District of Columbia.

at the Convention, but there is a possibility that Madison may have argued that the relationship of Congress to the Federal district would be analogous to that of state governments to incorporated cities within their boundaries.[40]

There were a few other discussions of the "exclusive legislation" clause in the state conventions. In Massachusetts there was no serious debate, though one delegate thought one mile square would be sufficient. In North Carolina one delegate feared that people who protested the acts of the government might, under the clause, be called traitors and tried within the district without a jury. In New York, though, there were more fireworks, produced by a delegate who was probably wholly opposed to the Constitution, not merely to the "exclusive legislation" clause, or who had favored the location of the seat of government in New York:

> The plan of the federal city, sir, departs from every principle of freedom, as far as the distance of the two pole stars from each other; for, subjecting the inhabitants of that district to the exclusive legislation of Congress in whose appointment they have no share or vote, is laying a foundation on which may be erected as complete a tyranny as can be found in the Eastern world. Nor do I see how this evil can possibly be prevented, without razing the foundation of this happy place, where men are to live without labor, upon the fruit of the labor of others; this political hive, where all the drones in the society are to be collected to feed on the honey of the land. How dangerous this city may be, and what its operation on the general liberties of this country time alone must discover; but I pray God, it may not prove

---

[40] Ibid., Vol. V, p. 432.

to this Western world, what the city of Rome, enjoying a similar constitution, did to the Eastern.[41]

d. Newspaper Reports of Debates in Congress

In September, 1787, the old Congress met to receive the report of the Constitutional Convention, agreed to send the proposed Constitution to the state legislatures, recommending that a convention of delegates be chose by the people in each state for the purpose of ratifying it. On the first Wednesday in January, 1789, electors were to be appointed in states that had ratified. Electors were to meet on the first Wednesday in February to vote for a president and on the first Wednesday in March, the first Congress under the Constitution was to begin proceedings at its "present seat."

Meanwhile the campaign for ratification went on in the states, and the ratifying conventions just mentioned occurred. Upon ratification by New Hampshire on July 2 ,1788, Congress ordered a committee to prepare an act to put the Constitution into effect. The act was adopted, and the first Wednesday in March 1789, was set for beginning proceedings, Rhode Island ratified in June, 1790, and Vermont in February, 1791.

The new Congress had to address itself at once to the problem of how to raise revenue, and organize the new government, but at an early date Madison, moved for a Committee of the Whole for the subject of the amendments, on the promise of which Virginia and several other states had ratified. Congress seemed to feel that it had other more urgent business, and Madison gave way to the extent of accepting the appointment of a Select Committee, but observed:

---

[41] Ibid., Vol. I, p. 402.

> That he thought it would be attended with salutary effects, should Congress devote at the present time so much at least as one day to this business, to convince the world that the friends of the Constitution were as firm friends to liberty as those who had opposed it. . . . The advocates for amendments are numerous and respectable, some alteration of the Constitution lies with great weight on their minds, they merit consideration.[42]

This passage is cited here merely to confirm the contention that Madison was a firm friend to human liberties and would never have deliberately deprived District inhabitants of their political rights except where he saw no escape compatible with the Constitution.

This session of Congress adjourned in September, having dealt with presidential salaries, import duties, the creation of a cabinet, establishment of government in the Western Territory, the judiciary, coastal trade, negotiation with the Indians, protection of authors and inventors, and having made provision for sending copies of the acts of Congress to each governor, and for supplying the members of Congress each with a complete set of the journals. The only reference to the new seat of government reported in the Herald of Freedom concerned the presentation by Seney to Congress of an offer of the Maryland legislature to cede exclusive jurisdiction of ten miles square in any part of Maryland to be used for the permanent seat of the Federal Government (May 16).

No reference to the new seat of government was found in the GeorgeTown Weekly Ledger until the issue of March 19, 1791, reporting the text of an act to amend an act "for Establishing the Temporary and Permanent Seat of the Government of the United

---

[42] Herald of Freedom (Boston), June 8, 1789.

States" according to which all necessary public buildings were to be erected on the Maryland side.[43]

Until the time for Congress to move to the new Federal City, press references to it were exceedingly rare. There were a few dealing with plans for the layout, and with expenditures by the commissioners, but little else in reports of Congressional activities; nor were there essays or letters to the editor indicating much public interest. In 1796 a bill was introduced for a loan to the Federal City, but it was reported that the method of handling it was left unaltered because it was desired to keep the United States as detached as possible.[44]

In December, 1799, it was decided that the buildings for accommodating the Congress and the President, and for the public offices of government, were sufficiently advanced so that the move to the District of Columbia could be made, in compliance with the original act of Congress.[45]

On April 4, 1800, the House of Representatives met in Committee of the Whole to make further provision for the removal and accommodation of the government. Harper moved that the furniture would be adequate for President Adams since he would live there only three months. This was agreed to, and it was also agreed to strike out provisions for paving the city. At this session five thousand dollars was appropriated for the library, and a committee was appointed to cooperate with the Senate on it.[46] No at-

---

[43] The George-Town Weekly Ledger, Vol. I, No. 49, March 19, 1791.

[44] The Columbian Chronicle (Georgetown), January 20, 1796.

[45] The Centinel of Liberty or George-Town and Washington Advertiser, Vol. IV, No. 60, December 17, 1799.

[46] Ibid., April, 1800.

tention was given to the future government of the District, although it had previously been decided that Congress would take over authority when the government moved to Washington.

IV. EARLY GOVERNMENTS OF THE DISTRICT OF COLUMBIA

In December, 1800, Congress met in Washington for the first time. In his message, President Adams referred to the problem of the government of the District in the following terms:

> It is with you, gentlemen to consider whether the local jurisdiction over the District of Columbia shall immediately be exercised. If in your opinion this important trust ought now to be executed, you can not fail to view the future probable situation of the territory, for the happiness of which you are now to provide. You will consider it as the capital of a Great Nation, advancing with unexampled rapidity — in the arts, in commerce, in wealth and in population, and possessing within itself, those energies and resources which, if not thrown away or lamentably misdirected, secure to it a long course of prosperity and self-government.[47] (Emphasis supplied.)

Thus, a proposal for self-government for the District of Columbia was brought to the attention of Congress by President Adams.

a. Assumption of Jurisdiction and Creation of Counties

The debates that followed hinged less on the degree of self-government to be granted than on the question

---

[47] The Museum and Washington and George-Town Daily Advertiser (successor to the Centinel), Vol. I, November 21, 1800; and Ann. Cong., 6c, 2s, p. 723.

of when, if ever, Congress should assume jurisdiction. At the time of cession, Congress had ruled that the inhabitants of the District should continue to be governed by the laws of their respective states. Under this ruling they had continued to enjoy full privileges of citizenship, including participation in national elections. The fact that assumption of jurisdiction by Congress would, unless the Constitution were amended, deprive the inhabitants of participation in national affairs, led many members of Congress to oppose assumption.

On December 17, 1800, General Lee reported out of a committee of the House, a bill for the local government of the District which continued existing laws in force in both parts of the District from the first Monday of December, 1800, and confirmed executive and judicial officers in their places until removal by the President, with future applicants to be authorized under the "exclusive legislation" clause of the Constitution. It also specified that:

> nothing in the act should alter, impeach, or impair the rights granted by or derived from acts of incorporation of Alexandria and George-Town, or any other body corporate or politic within the said District.[48]

The debate which ensued revealed a sharp division between members favoring immediate assumption of jurisdiction, and those favoring deferment as long as possible, and even forever. It is worthy of note that in this bill, as in all subsequent bills, there was no thought of encroaching upon the established rights and privileges of incorporated municipalities.

Those who opposed assumption argued that although the incorporated cities were safeguarded, those citizens of the District who lived outside the cities would

---

[48] Ibid., Vol. I, December 19, 1800 (Debate of December 17, 1800); and Ann. Cong., 6c, 2s, p. 824.

have no courts, and would be excluded from representation since the states would no longer be able to tax them. Randolph of Virginia opposed immediate assumption because he thought that, under the terms of the proposed bill, which would continue two systems of state laws within this single political unit, assumption would create anarchy, and that Congress could not have such a right. He followed with a passage, part of which has frequently been quoted in memorials to Congress from District inhabitants:

> Could any man desire to place the citizens of the District in such a state? To deprive them of the common right of participating in the passage of laws which all the citizens enjoyed. . . . I do not however believe the construction (i.e., the necessity for assumption) to be sound. I believe it to be opposed to the construction hitherto given by Congress. But were the construction just, to adopt the proposed bill would be to act in a way inadequate to the importance of the subject which, involving in it a system of government for a large portion of our citizens, ought not to be acted upon with precipitation, but ought to be conducted by the collected wisdom of Congress derived from mature and deliberate reflection.[49]

Harper of South Carolina believed that jurisdiction should be assumed immediately, laws for the government of the District established, and a complete judiciary set up. He reminded the House that the provisions of the Constitution on the subject of the District of Columbia had not been made with a view to the citizens' happiness, but to bestow dignity and independence on the government of the United States and to protect the government from violence and out-

---

[49] The Universal Gazette, Vol. II, January 10, 1801 (Debate of December 31, 1801); Ann. Cong. 6c, 2s, p. 869.

rage, so that the government would not have to rely on the Sheriff of Prince George's County or on the militia. He outlined what he considered a suitable plan with a judiciary for the present, and possibly police, but without incorporation of the City of Washington. This, he thought, would never be necessary.

The bill was recommitted and the Committee was enlarged by two members who favored assumption. On February 7, 1801, Congress assumed jurisdiction[50] (2 Stat. 103). At the very end of the session, the original division into two counties (Washington County comprising the Maryland section, and Alexandria County, the Virginia section) was greatly sharpened by a supplementary Act,[51] and the President was authorized to appoint justices for both. These were among the "midnight justices" appointed by President Adams just before he left office. For the present, Maryland laws were to run in Washington County, and Virginia laws in Alexandria County.

Meanwhile, debates on a suitable form of complete local government had begun to intermingle with the assumption debates, and assumption pros and cons continued to crop up in local government debates for some weeks.

b. Debates on Local Government in the District of Columbia

Inhabitants of the District had now begun to take an active interest in the political fate ahead of them. Under the name of Epaminondas, Augustus Woodward, a young lawyer, published a few articles in the National Intelligencer and The Museum under the title, "Considerations on the Government of the Territory of Columbia," some of which brought replies, in particular concerning the "Banks of Alexandria and Columbia" by a contributor who signed his articles by

---

[50] Ann. Cong., 6c, 2s, p. 1552.

[51] Ibid., p. 1563.

the name of Columbia. Epaminondas was the first to undertake a public discussion of the subject of assumption of jurisdiction. He reported that after the first bill was introduced to assume jurisdiction, "the supine indifference, which appeared to pervade the inhabitants of this Territory, has been succeeded by a lively attention; which better comports with the character of freemen, and of Americans":

> That cloud of uncertainty, which enveloped the fate of our nascent Metropolis, is in some measure dissipated; a gleam of light breaks through the obscurity on the minds of those who who for ten long years have waited with anxious expectation the arrival of this day; and a hope approaching to confidence may now be indulged, that their steady perseverance, and the intentions of the nation will not be disappointed. Public opinion seems to have taken a decided direction in favor of an assumption: a consentaneous disposition appears to actuate the minds of our rulers: and the fundamental parts of the very plan proposed for the local government of the Territory, have been publicly sanctified by a report from a Committee of the House of Representatives.[52]

Epaminondas goes on to compare Congress's power and responsibilities over territories and over the District of Columbia. Since the territories have the prospect of becoming independent states, he does not contend they must have representation in the two houses of the Federal Legislature. He admits that the subordinate legislative,executive and judicial authorities proposed to be erected in the District by Congress are intended to be permanent, and that it was never intended to admit the District of Columbia into the Union as an independent state, but he believed that a

---

[52] The Museum, etc., February 4, 1801, p. 2.

permanent provision for the representation of the District in both Houses of Congress ought to be made.

Epaminondas himself had proposed a plan for the government of the "Territory of Columbia." Under this plan, the legislature for the District would be totally free and unrestricted, and the Federal Government would interpose its authority and assume the task of prescribing regulations only when some glaring deviation from propriety should require their intervention. While this proposal was not adopted, it was considered by the Committee of the House of Representatives; a Bill for the Government of the District of Columbia was published early in February which apparently came close to Epaminondas's scheme.[53]

On January 26, a petition from various freeholders and inhabitants of Alexandria to establish a system of legislation and government for the District of Columbia was referred to a Committee of the Whole House. On the same date it was resolved that the Board of Commissioners for the City of Washington ought to be discontinued, and all their powers transferred to the Secretary of the Treasury.

Shortly before Congress assumed jurisdiction, an extended debate began on a local government bill modeled closely on the Constitution. It provided for an elected senate and house and biennial elections, but for an appointed executive and judiciary. The bill never passed. It gave rise, however, to expressions on nearly all sides of a desire to protect the political rights of District citizens insofar as they were compatible with the Constitution.[54] Smilie (Pennsylvania) ought to postpone consideration of the bill because it would disfranchise

---

[53] The Museum, etc., February 2, 1801, p. 2.

[54] The Washington Federalist, Vol. I, No. 81, February 24, 1801 (Debate of February 2, 1801).

> . . . some thousands of persons of their polical rights which they now enjoyed. . . . By the passage of this bill, the people of the District would be reduced to the state of subjects, and deprived of their political rights, and he very much doubted of their civil rights also. . . . If it was necessary to reduce the city of Washington to a state of local government by an incorporation, he contended that the act could be done by the state legislature (i.e., without assumption of Congressional jurisdiction). As he did not conceive the local demands of the people called for it — as they could not want no such assumption as the bill contemplated; and as he could perceive no advantage to be derived to the general government thereby, and as the assumption would eventually injure the people, he trusted it would be postponed at least.[55]

Craik, a representative of the Maryland portion of the District, declared that the people of the District desired assumption and wished for no postponement, for they were very uneasy concerning the validity of their property holdings and securities of various sorts.

> They now call loudly upon the national government to remove from them this state of doubt and uncertainty; this is the object of the bill before the House.[56]

H. Lee thought that Smilie's objections to the bill arose from enmity toward the District over the loss of the national capital to the state of Pennsylvania. He trusted that other gentlemen would:

---

[55] The Washington Federalist, Vol. I, No. 81, February 2, 1801, Ann. Cong., 6c, 2s, p. 992.

[56] Ibid., p. 993.

> . . . lay to their hands and join to make this District a settled government . . . and that their efforts would be used to produce a well digested and valuable government, for the security of their civil and political rights.[57] (Emphasis supplied.)

Smilie continued to argue that the bill would deprive citizens of the District, in that they would not be represented in the national government, and that their judges and governor were not to be their choice but were to be appointed by the President:

> The privilege of a local legislature might be given to the people, but of what avail could they be if the governor appointed by the President would deprive them of every act they might make by his negative? Where was their security if the acts of these representatives of the people could be negatived tomorrow by a power deriving authority from elsewhere? Much as gentlemen might talk about dignity of government, nothing, he thought, would more comport with true dignity than human liberty, and without it dignity of government was not worth a name. It surely must be disagreeable for the government to be in the midst of a people who are deprived of their rights. . . .[58]

Dennis asked if the general interests of the District would not be more secured by persons immediately acquainted and concerned than by persons of different states, and at a distance from the place:

> One or two representatives to each legislature would be the utmost that the District could send, and these placed amongst men of different interests, what could be expected compared

---

[57] Ibid., p. 994.

[58] Ibid., p. 997.

to a body, such as proposed by this bill, drawn from among the people themselves? In those legislatures, the numerous local circumstances which must call for attention in a newly planted and rapidly growing capital city never can receive due attention. . . . As this city, therefore, grew in population and in trade, the demand for legislative attention would increase, and either its interests must be neglected or the sittings of the state legislature (either Maryland or Virginia) must be protracted too far. Besides this, experience must have taught gentlemen that numerous bodies could not attend to the minute advantages of a place like this so well as small bodies, and particularly such as well know its situation and circumstances. . . . It was said that by assumption of jurisdiction, these people would be left without a representation. He would ask how much they were heretofore represented in the two legislatures to which they sent delegates. They were so in name, but very little in essence, from the comparatively small number it could send to the legislature.

But the argument went as much against the assumption at any future time as at present. That it would be some time taken up, there could be no doubt; it ought, therefore, to be recollected that if it would be ever proper, a period more unfavourable to the interest of the people might be selected, than the present, and, therefore, the present moment ought to be accepted, especially so as the people were desirous of it and were satisfied with the features of the bill. From their contiguity to, and residence among the members of the general government, they knew that though they might not be represented in the national body, their voice would be heard. But if it were necessary, the Constitution might be so altered as to give them a delegate to the

> general legislature, when their number should be sufficient.[59]

Mason, of Virginia (an inveterate opponent of the Constitution as a whole), disliked the establishment of a government, the executive and judiciary of which were in the appointment of the President, and with judges of the superior and inferior courts to be paid out of the Treasury of the United States:

> Could it be the wish of gentlemen, he asked, to establish in the very heart of the United States, and immediately under the eye of the government, such a principle as that these rulers should be independent and entirely above the control of the people? He declared that if he should be in Congress again, and as long as he should be in the House, he should think it his duty to exert himself for the repeal of so bad a principle, and leave the governor, the judges, and the legislature immediately amenable to the people.

He objected also to the way in which the bill provided for choosing the House and the Senate:

> Although in these things there was a similarity to the choice of the general government, he would ask what similarity there could be in the two governments? In the one is a vast extent of country, and a numerous population, in the other a small population, a small tract of country, and an almost general knowledge by every one of every individual init. He doubted whether the legislature of the Union could at all deldgate powers to this local government, but whether or not, he could see no kind of necessity . . . to assume them.[60]

---

[59] Ibid., p. 997.

[60] Ibid., p. 1000.

The debate was continued on February 5, with many members speaking on the subject of annual versus the biennial elections provided in the bill. Bayard (Delaware) thought this of little importance. He discussed the extent of the powers to be given to the proposed local government. He looked upon these representatives as a corporation formed for mere local and comparatively unimportant purposes — a legislature upon an excessively diminutive scale, "clothed with powers to prescribe how the oxen should be yoked, and such like purposes." He said that they were refused the power of laying taxes, and for this reason the governor and judges were to be paid out of the treasury of the United States. He was, therefore, opposed to frequent elections.

Otis (Massachusetts) supported him, pointing out that although the powers of the local government were called legislative, "they were in effect corporate powers no part of which but was subject to control by a higher power."

Gallatin (Pennsylvania) objected to the arguments of Bayard and Otis that the powers of the legislature of the District would be so insignificant that there was no real necessity for them.

> He had formed a very different opinion from this. It was perfectly true that the people of this district could not enjoy the same degree of political liberty with other states, but this was not the fault of the present Congress; if any fault, it laid with the convention, who expressly proved that exclusive jurisdiction should be assumed, and, therefore, the people could not be represented in the general government. As, therefore, the assumption was about to be made, he wished to give these people some satisfaction for the losses which could not now be wholly avoided; he wished

> to preserve to them their rights of suffrage as enjoyed under their former government.[61]

Gallatin pointed out that under the proposed bill the national government was fully protected in respect to the points raised by Bayard through the Congressional power of repeal, and positive law. He acknowledged that it was impossible to give the District legislature sovereign and complete legislative powers, but was disposed to grant as much as possible.

Lee thought the similarity of the proposed local law to the Constitutional system was of immense value. He referred to the Constitution as a document whose intrinsic worth had merited and obtained the admiration of the world, and thought that the local law based on it "would not only be beneficial to the inhabitants, but would encourage the best, the most accomplished and learned, and the most wealthy individuals of the world to fix their residence in this seat of the American empire."

Claiborne thought that if the bill was to be passed it ought to afford the inhabitants their former usages and, as far as possible, their right of annual suffrage, i.e., annual elections instead of the proposed biennial elections.

As already indicated on page 29, no agreement on the subject of local government for the District was reached in this session, so Maryland and Virginia laws continued to run, but under justices appointed by the President. Washington remained unincorporated.

c. Early Forms of Local Government

Early in 1802 there were new proposals for a territorial form of government with an appointed governor and elected legislature, but Alexandria opposed any consolidation with the Maryland portion of the

[61] Ibid., February 27, 1801 (Debate of February 4, 1801).

District. On the other hand, protests against taxation without representation arose in the two incorporated cities and in Washington. In May property owners in Washington petitioned for and were granted a charter.[62] With the qualified voters in the other two cities, this brought about 7,600 out of 10,000 free white inhabitants of the District of Columbia under a fair degree of self-government,[63] and was compatible with customary systems in Maryland and Virginia where areas outside incorporated towns are normally governed by appointive levy courts (Maryland) or county courts (Virginia). Such courts had, as already mentioned, been established by Congress in 1801.

In 1803 several proposals for retrocession of the District to the states were discussed in Committee of the Whole in the House of Representatives. Three points touching on political rights were raised: that the inhabitants of the District were deprived of their political rights; that Congress was incompetent to legislate because its members were strangers to its local interests; and that exclusive legislative control by Congress was an example of government without representation dangerous to the liberty of the United States. Those opposed to retrocession contended that when the District became sufficiently populous it would have a representative in Congress, and in the meantime it would have a local legislature. Representatives from five states rose to speak in behalf of the political rights of District inhabitants though, as in previous debates, there was disagreement as to how such rights could be insured. Retrocession was defeated but, in 1804 and 1805, Congress made attempts to ameliorate the situation by liberalizing the charters of the District cities.[64]

---

[62] Ann. Cong., 7c, 1s, May 1, 1802.

[63] Constance Green, Washington (Princeton, 1962), Vol. I, p. 21.

[64] Green, op. cit., Vol. I, p. 31; and Senate Misc. Doc. 126, 50th C., 1 S., pp. 8, 9.

The act of incorporation granted to the City of Washington in 1802 ran for two years. It provided an appointive mayor with the power of veto over city council acts, but the veto could be overridden by a three-quarters vote of the members in both chambers. The common council was chosen by free white male taxpayers resident in the city for a year. From these elected members, the common council chose five to serve as an upper house. In 1804 amendments made both houses directly elective, and the charter was continued for fifteen years. The common council was responsible for the poor, for repair of streets, construction of bridges, for health and nuisance problems, regulation of licensing, establishment of fire wards and night patrols, and for levying of real estate taxes. Under the amended charter, the city was permitted to open public schools.

Subsequently Washington's charter became increasingly generous. In 1812 the city council was permitted to elect the mayor, and in 1820 qualified voters were permitted to elect the mayor directly for a two-year term. This was continued down to 1871.

Throughout the early Congresses it seems to have been generally accepted that the Constitution precluded District participation in the national government, but that the largest practicable measure of self-government should be granted to it.

BRIEF FOR APPELLEES

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 21,786

DAVID CARLINER, et al.,

Appellants,

v.

COMMISSIONER OF THE DISTRICT OF COLUMBIA, et al.,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

HUBERT B. PAIR,
Principal Assistant Corporation
Counsel, D. C.

RICHARD W. BARTON,
Assistant Corporation
Counsel, D. C.

DAVID P. SUTTON,
Assistant Corporation
Counsel, D. C.

Attorneys for Appellees,
District Building,
Washington, D. C. 20004

STATEMENT OF QUESTION PRESENTED

Whether the Constitution of the United States confers upon appellants, as citizens of the District of Columbia, the right to elect officials to govern them in local matters.

I N D E X

Page

SUBJECT INDEX

CASES CITED

OTHER AUTHORITIES CITED

---

* Cases chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS
For The District Of Columbia

No. 21,786

DAVID CARLINER, et al.,

Appellants,

v.

COMMISSIONER OF THE DISTRICT OF COLUMBIA, et al.,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLEES

SUMMARY OF ARGUMENT

The Constitution clearly provides that the authority of Congress to legislate for the District of Columbia is exclusive and plenary. Decisions of the Supreme Court construing and upholding this authority indicate that the nature and extent of any local government in the District is for Congress alone to decide, and that the Constitution does not confer upon District residents the right to be governed by officials elected by them.

ARGUMENT

Appellants' complaint was properly dismissed by the court below since the Constitution does not confer upon District of Columbia residents the right of local suffrage.

Reduced to its essentials, the contention of appellants, both here and in the lower court, is that the Constitution confers upon District of Columbia residents the right to vote for local officials. For this reason, appellants argue that Reorganization Plan No. 3 of 1967 (D. C. Code, 1967, Supp. I, 1968, Title I, Administration, Appendix, p. 12, et seq.),[1] creating the existing form of local government, is invalid.

The same contention, or a variation thereof, has already been made to and rejected by the courts of this jurisdiction in other cases. In Hobson v. Tobriner, 255 F. Supp. 295 (D. D. C., 1967), Judge Gasch concluded that a question similar to that presented here was so lacking in substance as to require denial of an application for a three-judge court. Thereafter, this Court, on September 29, 1966, entered an order denying a petition for a writ of mandamus (Hobson v. Gasch, No. 20,388), and the Supreme Court denied a petition for a writ of certiorari.

---

[1] This reorganization plan was promulgated by the President pursuant to the provisions of the Reorganization Act of 1945, §§ 133Z through 133Z-15.

In Carliner v. Board of Com'rs. of District of Columbia, 265 F. Supp. 736, 738 (D. D. C., 1967), Judge Jones rejected "substantially the same claims" as were made in Hobson v. Tobriner, supra. The Carliner case was appealed to this Court (No. 20,873) where, upon appellants' motion, it was, on September 26, 1967, remanded to the court below with instructions to dismiss the complaint as moot.

While the Twenty-Third Amendment to the Constitution recently conferred upon District of Columbia residents the right to vote in national elections, it conveyed no right to elect officials to govern them in local matters. Appellants claim, however, that such a right is a "liberty" within the meaning of the Fifth Amendment (Brief for appellants at 10), a right retained by the people within the meaning of the Ninth Amendment (Brief for appellants at 16), and a power reserved to the people within the meaning of the Tenth Amendment (Brief for appellants at 19).

If, as asserted, the Constitution gives District residents the right to govern themselves through a locally-elected body, it would necessarily follow that Congress has historically engaged in an unconstitutional usurpation of power whenever it chose to exercise its exclusive legislative authority over the District of Columbia. The fallacy in appellants' argument is that, in relying on the Fifth, Ninth, and

Tenth Amendments, they overlook a constitutional provisions of equal dignity which delineates the governing power of Congress over the District. Article I, Section 8, Clause 17 of the Constitution, provides in pertinent part that.

> "Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles Square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings * * * ." [Emphasis added.]

The Supreme Court has construed Article I, Section 8, Clause 17 to mean that, with respect to the District, Congress possesses the combined powers of both a general and a local government, and that such powers are plenary and unqualified. O'Donoghue v. United States, 289 U. S. 516 (1933); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427 (1932). Accord Neild v. District of Columbia, 71 U. S. App. D. C. 306, 110 F. 2d 246 (1940). Moreover, the Supreme Court has consistently held that the constitutional power of Congress to legislate with respect to the District is as great as the power of a state legislature

with respect to the state or any of its subdivisions.[2] Berman v. Parker, 348 U. S. 26 (1954); Atlantic Cleaners & Dyers v. United States, supra, at 434-435; Capital Traction Co. v. Hof, 174 U. S. 1, 5 (1899); Gibbons v. District of Columbia, 116 U. S. 404, 407-408 (1886); Mattingly v. District of Columbia, 97 U. S. 687, 690 (1878).

As early as 1820, the Court, through Chief Justice Marshall, stated that persons choosing to reside in the District of Columbia have "voluntarily relinquished the right of representation, and * * * adopted the whole body of congress for * * * [their] legitimate government * * *." Loughborough v. Blake, 18 U. S. (5 Wheat.) 317, 324 (1820). Later, in 1838, the Court stated that "Congress has the entire control over the district for every purpose of government * * * ." Kendall v. United States, 37 U. S. (12 Pet.) 524, 619 (1838). In Shoemaker v. United States, 147 U. S. 282, 300 (1893), the Court noted that Congress has "full and unlimited jurisdiction, both of a political and municipal

---

[2] The instant case involves the particular constitutional relationship of Congress to the District rather than the relationship of states to their political subdivisions generally. It is interesting to note, however, that the Constitution does not confer a republican form of government on municipalities. See discussion in Bianchi v. Griffing, 271 F. Supp. 497, 501-502 (E. D. N. Y., 1967). See also Eckerson v. City of Des Moines, 137 Iowa 452, 115 N. W. 177 (1908); Anno., 67 A. L. R. 737, 741.

nature, over the District of Columbia * * * ." Thereafter, in Heald v. District of Columbia, 259 U. S. 114, 124 (1922), the Court, speaking through Mr. Justice Brandeis, rejected the contention that a local taxing statute was void because it subjected District residents to taxation without representation, stating that: "Residents of the District lack the suffrage and have politically no voice in the expenditure of the money raised by taxation." More recently the Court has noted that, while Congress may constitutionally delegate powers of self-government and home rule to the District of Columbia, it may at any time "revise, alter, or revoke the authority granted." District of Columbia v. Thompson Co., 346 U. S. 100, 109 (1953).

Clearly, therefore, the argument that residents of the District of Columbia have a constitutional right to elect representatives to govern them locally cannot be reconciled with the explicit constitutional authority of Congress over the District which authority has been upheld by an unbroken line of Supreme Court decisions.

In an attempt to establish that the framers of the Constitution intended to secure the right of self-government to District residents, appellants rely on historical materials which contain pronouncements of some of the framers. At best, however, such pronouncements express the hope that Congress would grant a right of municipal suffrage

to District residents at some future time. An examination of Madison's essay in the Federalist Papers, No. 43, upon which appellants rely (Brief for appellants at 23), graphically illustrates this point. In this essay, Madison urged that "indispensable necessity of complete authority at the seat of government, carries it own evidence with it." He further commented that, without such complete authority:

> "* * * not only the public authority might be insulted and its proceedings interrupted with impunity; but a dependence of the members of the general government on the State comprehending the seat of the government, for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy. * * * "

He then stated that:

> "* * * The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the State, and of the inhabitants of the ceded part of it, to con-

> cur in the cession, will be derived from the whole people of the State, in their adoption of the Constitution, every imaginable objection seems to be obviated." [Emphasis added.]

It is abundantly clear from the underscored language that Madison recognized that municipal suffrage for District residents was not a right previously incorporated into the Constitution by its framers, but, on the contrary, was a privilege which he then believed would "be allowed them" by Congress. See 2 Story, Commentaries on the Constitution of the United States, § 1223 at 130 (5th ed., 1891).

Thomas Jefferson's "Opinion relative to locating the Ten Mile Square for the Federal Government, and building the Federal City" (March 11, 1791), relied on by appellants (Brief for appellants at 24), is likewise of no assistance to them. In this opinion, Jefferson did nothing more than express his concern that the President would take proper steps to protect property to be acquired in the federal city as there "* * * [was] not as yet a town legislature" to perform this task. Jefferson significantly fails to express the view that any future town legislature should be an elective one rather than an appointive one, much less the view that the Constitution clothes District residents with a right of municipal suffrage. Padover, Thomas Jefferson and The National Capital, 48.

Similarly, in the message of President John Adams to Congress in 1800, also relied on by appellants (Brief for appellants at 24), the President did nothing more than express the hope that the "future" nation's capital would enjoy a "long course of prosperity and self-government." At no time in his message did President Adams discuss local self-government in a constitutional context.

Accordingly, while appellants' historical materials may provide Congress with motivation for delegating a right of self-government to District residents, they by no means establish a constitutional right to suffrage in local matters.

Appellants also attack Reorganization Plan No. 3 on the ground that it " 'Sweeps Unnecessarily Broadly' in Depriving the Citizens of the District of Columbia Their Right to Local Suffrage" (Brief for appellants at 11-15). Appellants assert in this respect that a governmental structure with elective officials could have been lawfully created instead of one that calls for appointive officials. Cf. District of Columbia v. Thompson Co., supra, at 109. On the basis of a line of Supreme Court decisions which they consider analogous, appellants then reason that a form of government which affords municipal suffrage should have been created. Such decisions hold only that, while there may be a legitimate governmental interest in regulating a certain sub-

ject matter, the nature of the regulatory means chosen must not be such as to stifle preferred constitutional freedoms such as speech and association. This analogy is completely untenable since Reorganization Plan No. 3 does not clash with any preferred constitutional freedom. In attempting to find such a freedom in the asserted right to vote for local officials, appellants overlook the fact that District residents have no such right. The means of local government which Congress chooses, or authorizes the President to choose, is wholly a matter of legislative discretion. Thus, in District of Columbia v. Thompson Co., supra, the Supreme Court noted that the nature and extent of any local government in the District of Columbia is for Congress alone to decide, stating:

> "* * * It would seem then that on the analogy of the delegation of powers of self-government and home rule both to municipalities and to territories there is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative power, subject of course to constitutional limitations to which all law-making is subservient and subject also to the power of Congress at any time to revise, alter, or revoke the authority granted." 346 U. S. at 109 [Emphasis added.]

Likewise, in Binns v. United States, 194 U. S. 486 (1904), the Supreme Court, in discussing the power of Congress over the District of Columbia and the territories in a related context, stated:

"It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories. * * * In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory. It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District. It may entrust to them a large volume of legislative power, or it may by direct legislation create the whole body of statutory law applicable thereto. * * * " Id. at 491-492. [Emphasis added.]

Clearly, therefore, appellants' contention that the existing form of local government in the District of Columbia unconstitutionally deprives them of the right of suffrage is wholly without substance. For this reason, the court below was fully justified in ruling in appellees' behalf.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the judgment of the court below should be affirmed.

CHARLES T. DUNCAN,
Corporation Counsel, D. C.

HUBERT B. PAIR,
Principal Assistant Corporation
Counsel, D. C.

RICHARD W. BARTON,
Assistant Corporation
Counsel, D. C.

DAVID P. SUTTON,
Assistant Corporation
Counsel, D. C.

Attorneys for Appellees,
District Building,
Washington, D. C. 20004